No. 96-1829-CFX Title: Montana, et al., Petitioners
v.
Crow Tribe of Indians, et al.

Docketed: May 16, 1997 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	May 16 1997	Petition for writ of certiorari filed. (Response due August 11, 1997)
	Jun 6 1997	Order extending time to file response to petition until July 15, 1997.
	Jun 6 1997	This extension is granted for all respondents.
	Jul 14 1997	Order further extending time to file response to petition until August 11, 1997.
	Jul 14 1997	Brief of respondent Crow Tribe of Indians in opposition filed. VIDED.
	Jul 14 1997	Brief amici curiae of California, et al. filed.
	Aug 11 1997	Brief amicus curiae of Multistate Tax Commission filed.
	Aug 13 1997	Brief of respondent United States in opposition filed. VIDED.
	Aug 22 1997	Reply brief of petitioners Montana, et al. filed.
	Sep 3 1997	DISTRIBUTED. September 29, 1997
	Oct 6 1997	REDISTRIBUTED. October 10, 1997
	Oct 14 1997	Petition GRANTED. SET FOR ARGUMENT February 24, 1998. **********
	Nov 25 1997	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Nov 26 1997	Brief of petitioners Montana, et al. filed.
	Nov 26 1997	Joint appendix filed.
	Nov 26 1997	*Joint Appendix in two volumes
	Nov 26 1997	Brief amici curiae of New York, et al. filed.
	Dec 8 1997	Order extending time to file brief of respondent on the merits until January 12, 1998.
	Dec 22 1997	CIRCULATED.
	Jan 9 1998	Order further extending time to file brief of respondent on the merits until January 16, 1998.
	Jan 12 1998	Brief of respondent Crow Tribe of Indians filed.
	Jan 16 1998	Brief of respondent United States filed.
	Jan 20 1998	Motion of the Solicitor General for divided argument filed.
	Jan 26 1998	Motion of the Solicitor General for divided argument GRANTED.
	Jan 26 1998	Record filed.
	Feb 2 1998	Record filed.
	Feb 6 1998	Reply brief of petitioners Montana, et al. filed.
	Feb 13 1998	Letter from counsel for the petitioner received and distributed.
	Feb 24 1998	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term, 1996

STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

CROW TRIBE OF INDIANS; and
UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May an Indian tribe, or the United States on the tribe's behalf, recover in quasi-contract from a State and a county taxes paid pursuant to state law by a third-party taxpayer that has waived any entitlement to a refund?

PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioners State of Montana, Mary Bryson in her capacity as director of the Montana Department of Revenue, Big Horn County, Montana, and Martha Fletcher in her official capacity as treasurer of Big Horn County, Montana, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The final opinion of the Ninth Circuit in this case is reported at 92 F.3d 826 and 98 F.3d 1194 and is reproduced in the Appendix commencing at App. 1. Prior decisions in this matter by the court of appeals are reported at 650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982), and reproduced in the Appendix commencing at App. 167 and 169; at 819 F.2d 895 (1987), and reproduced in the Appendix commencing at App. 88; and at 969 F.2d 848 (1992), and reproduced in the Appendix commencing at App. 58. A prior summary affirmance of the court of appeals' 1987 decision is reported at 484 U.S. 997 (1988) and is reproduced in the Appendix at App. 87.

The opinion of the district court is unreported and reproduced in the Appendix commencing at App. 17. Prior reported opinions of the district court in this matter that were the subject of review by the court of appeals appear at 469 F. Supp. 154 (1979), and reproduced in the Appendix commencing at App. 197; and at 657 F. Supp. 573 (1985), and reproduced in the Appendix commencing at App. 110. An unreported opinion of the district court

reviewed by the court of appeals in its opinion reported at 969 F.2d 848 (1992) is reproduced in the Appendix commencing at App. 67.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1996, and rehearing was denied on February 21, 1997. App. 228. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL LAW INVOLVED

This petition presents an issue of federal common law. App. 7-12.

STATEMENT

A. Factual Background

This case does not involve any taxes actually paid by respondent Crow Tribe to petitioners. Instead, it involves taxes paid to petitioners by Westmoreland Resources, Inc., a nontribal enterprise, which mined coal on various properties it leased from respondent Crow Tribe. Specifically at issue are $46.8 million in coal severance taxes that Westmoreland paid to the State between 1976 and 1982 pursuant to 1975 Montana Laws chapter 525, §§ 1-8 (codified as amended at Mont. Code Ann. §§ 15-35-101 to -205 (1995)), and $11.4 million in gross proceeds taxes that Westmoreland paid to Big Horn County between

1975 and 1987 pursuant to 1975 Montana Laws chapter 525 §§ 9-12 (codified as amended at Mont. Code Ann. §§ 15-23-701 to -707 (1995)). App. 234-242.

Westmoreland paid all of the taxes at issue without initiating any tax protest under the procedures provided by Montana law. App. 37 (FOF ¶ 60).[1] In 1991, moreover, it entered into a settlement agreement with both Montana and Big Horn County. Under that agreement, Westmoreland dismissed with prejudice a cross claim filed early in this litigation seeking recovery of the taxes it had paid to petitioners and "waived and/or disclaimed any claim of entitlement to a refund of severance and gross proceeds taxes paid to the state and county" during the relevant years. App. 37 (FOF ¶ 61).

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[1] Westmoreland's tax refund remedies differed as to each tax. With respect to the severance tax, the protest procedure for returns due on or before December 31, 1980 was governed by Mont. Code Ann. § 15-1-401 (1979). Under that provision, Westmoreland was required to file a written protest with the Montana Department of Revenue specifying the reasons for the protest and then to initiate a state court action within 60 days. For returns due after December 31, 1980, it was required by Mont. Code Ann. § 15-35-114 (1981) to file with the Department of Revenue a claim seeking a refund within five years of the involved return's filing. With respect to gross proceeds tax payments due before July 1, 1981, Westmoreland was required by Mont. Code Ann. § 15-1-402 (1979) to file a written protest and thereafter to initiate a state district court action for a refund within 90 days of the protest. For gross proceeds tax payments due after July 1, 1981, the administrative and judicial appeal procedures in Mont. Code Ann. §§ 15-1-402, 15-2-301 and -303 to -306 (1981) governed, although Westmoreland alternatively could have challenged its obligation to make those payments by pursuing the declaratory judgment remedy procedure provided under Mont. Code Ann. § 15-1-406 (1981).

Of the $46.8 million Westmoreland paid in severance taxes, the majority was used for the State's general fund, state equalization aid to public schools, highway improvement, archaeologic preservation, alternative energy research, and the general funds of the counties where coal was mined. App. 23-24 (FOF ¶ 27). The remainder was allocated to three trust funds, the income of which was available for various expenditures. App. 24 (FOF ¶ 28). Approximately $3.1 million of the gross proceeds taxes were retained by Big Horn County and used for current expenditures, while 91 percent of the remainder, or $7.6 million, was distributed to two school districts serving county children in accordance with state law. CR 679 at Agreed Facts ¶ AC.

B. Proceedings Below

1. ***Crow I* and *Crow II*.** Respondent Crow Tribe initiated this litigation in 1978 by challenging application of the Montana coal severance tax to coal production within the Crow Indian Reservation and from mineral estates held in trust for the Tribe under a parcel of land known as the ceded strip. The ceded strip is located immediately north of the Reservation's exterior boundaries, and a portion of the Tribe's underlying mineral estate was leased to Westmoreland. The Tribe alleged that these taxes were preempted by the Omnibus Mineral Leasing Act of 1938, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g). App. 230-33. The district court dismissed the Tribe's complaint for failure to state a claim, but the Ninth Circuit reversed. App. 167, 169, 197; *Crow Tribe v. Montana*, 469 F. Supp. 154 (D. Mont. 1979), *rev'd*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390

(9th Cir.) ("*Crow I*"), *cert. denied*, 459 U.S. 916 (1982). Following trial on remand, the district court concluded that the taxes were not preempted, but the Ninth Circuit reversed again and was affirmed by this Court. App. 87, 88, 110; *Crow Tribe v. Montana*, 657 F. Supp. 573 (D. Mont. 1985), *rev'd*, 819 F.2d 895 (9th Cir. 1987) ("*Crow II*"), *aff'd mem.*, 484 U.S. 997 (1988).

2. ***Crow III*.** Following the court of appeals' decision in *Crow II*, the Tribe filed its fourth amended complaint (App. 252-60) which contained two claims for relief – one in assumpsit for money had and received and one for a constructive trust – seeking recovery of the taxes paid by Westmoreland to Montana and Big Horn County, along with prejudgment interest. Petitioners moved to dismiss the complaint for failure to state a claim, arguing in part that the Tribe, or the United States as its trustee,[2] was not entitled under accepted assumpsit principles to recover taxes which it did not pay. The district court denied petitioners' motion but later certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). App. 61, 67.

The Ninth Circuit initially gave petitioners leave to appeal under § 1292(b) but after the case's submission concluded such leave had been granted improvidently. App. 58; *Crow Tribe v. Montana*, 969 F.2d 848 (9th Cir.

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[2] The United States, which had intervened as a plaintiff in 1983 following the first remand, lodged an amended complaint six months after the Tribe had filed its amended complaint. Other than requesting that restitution be paid to it in trust for the Tribe and asserting jurisdiction under 28 U.S.C. § 1345, the Government's complaint was substantively identical to the Tribe's. App. 243-51.

1992) (per curiam) ("*Crow III*"). It nonetheless issued an opinion discussing briefly the fundamental question whether the Tribe had a legal right to recover taxes it never paid. The panel stated that "a duty inter sese between the interests of the Crow Tribe and the money collected from a third person by Montana's void tax" had "already [been] addressed by this court in [*Crow II*]." App. 59. It then quoted several passages from the *Crow II* opinion which concluded that the taxes had "at least some negative impact" on the Tribe's economic interests by decreasing marketability of Westmoreland's coal and thereby reducing potential royalties to the Tribe. App. 59-60. The court did not explain how the reasoning in its earlier decision on the issue of preemption controlled its decision on the entirely distinct question of whether the Tribe could state a claim for quasi-contractual relief. Nor did it explain why the economic harm the Tribe may have suffered – i.e., a possible reduction in lease income – entitled it to recoup an amount equal to any or all of Westmoreland's *tax* payments.[3]

3. ***Crow IV***. The district court held a six-day trial following the Ninth Circuit's decision in *Crow III*. Much

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[3] *Crow III*'s reliance on *Crow II* was not without a measure of irony. The portion of *Crow II* relied upon cited to footnote 13 of the *Crow I* opinion, but the court in *Crow III* chose to ignore the concluding sentence of that footnote: the *Crow I* panel's statement that, "[a]s to the taxes already paid by Westmoreland, . . . it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid." App. 186 n.13. The panel below, which largely predicated its decisionmaking with respect to the quasi-contract claim on law-of-the-case principles, also failed to address the inconsistency of its reasoning with *Crow I*.

of the evidence was directed to three "equitable facts" that the district court had identified as potentially important in the decision at issue in the *Crow III* interlocutory appeal: (1) "the amount of money collected by the State," (2) "whether the Tribe would have collected similar amounts but for the State tax," and (3) "the amount of money that the State channeled to services enriching the Tribe." App. 84. The district court also had remarked when identifying these factors that "[o]nly upon inspecting the field of countervailing equities can the Court, in fairness and good conscience, impose upon the State of Montana a decree in equity to release coal severance tax funds." *Id.*

The evidence demonstrated, as noted above, that Westmoreland had paid taxes totaling approximately $58 million to Montana and Big Horn County. With respect to the second factor, the evidence on this issue established, and the district court found, that Westmoreland had no tax obligation to the Tribe during the 1976-82 period, when all of the severance taxes and 63 percent of the gross proceeds taxes were collected, and in any event would not have paid tribal taxes absent the Secretary of the Interior's approval of the underlying taxation code.

More specifically concerning the second factor, the district court found that a tax code adopted by the Tribe in 1976, which had sought to impose a 25 percent severance tax on production of tribally owned coal, had not been approved by the Secretary for application to the ceded strip. App. 31 (FOF ¶ 49). This was due in part to the fact that "the Tribe failed to follow its own constitutional procedures in amending its constitution for imposing the coal tax, *and not because Montana had its tax in*

place." App. 36-37 (FOF ¶ 59) (emphasis added). The court further found that, in the absence of such an approved tax code, Westmoreland was unable to pass the tax through to its utility customers and therefore "would not have paid coal taxes to the Tribe" regardless of whether it had state tax obligations. App. 35 (FOF ¶ 57). Evidentiary support for the district court's conclusion was extensive and included the fact that the Tribe's and Westmoreland's pleadings referred to the absence of secretarial approval for the tribal tax (CR 2 at ¶¶ 30, 31; CR 40 ¶¶ 30, 31; CR 45 at Ans. ¶ 31; CR 117A at ¶ 34); the observation in *Crow I* that the Tribe's tax was inapplicable to Westmoreland's ceded strip production (App. 192 n.19); the lack of any demand for taxes by the Tribe during the relevant period (CR 679 at Agreed Facts ¶ AA); the Tribe's own legal analysis provided to Westmoreland in 1982 indicating the tax's nonapplicability absent secretarial approval (Defs. Ex. 549 at 3, 18); the testimony of Westmoreland's president and its principal attorney (App. 32-33 (FOF ¶ 54)); and an October 1982 lease amendment under which Westmoreland agreed to pay a "tax" equal to the state taxes less amounts paid to Montana and Big Horn County (App. 31-32 (FOF ¶ 51)).

As to the third equitable consideration, petitioners introduced undisputed evidence that Montana and Big Horn County provide services substantially benefiting the Tribe's members who reside on-reservation. Expert testimony and associated reports analyzing the nature and cost of governmental services thus established, for example, that tribal members have access to the same state services as other residents living on or off the Reservation and that, over an 18-year period between 1975 and

1992, the cost of state services provided members was estimated conservatively at $79 million. Defs. Ex. 511 at 56. Other evidence showed that tribal members residing within Big Horn County received county and school district services with an estimated cost of $25.4 million over a 12-year study period between 1975 and 1987. Defs. Ex. 614 at 2. In addition to these reservation-specific services, Montana and Big Horn County also provide essentially all governmental services on the ceded strip, where the coal at issue was mined and whose surface is not part of the Reservation. App. 38 (FOF ¶ 65).

It was in this factual context that the district court rejected the Tribe and United States' claim for restitution of Westmoreland's tax payments. App. 49 (COL ¶ 24). In concluding that quasi-contractual relief was not appropriate, the court recognized that the coal taxes may have had some adverse impact on the Tribe but reasoned that

> it does not follow that [petitioners], who received taxes from Westmoreland under what was then an existing lawful obligation, now owe restitution damages to the Tribe in light of the failure of Westmoreland to initiate appropriate proceedings to recover funds. *The opposite result would allow the Tribe and the United States to recover taxes which the actual taxpayer admittedly cannot.* The Tribe could have redressed Westmoreland's admission by proceeding against Westmoreland or it could have contracted with Westmoreland to initiate such appropriate action to recover the Montana taxes.

App. 51 (COL ¶ 28) (emphasis added).

The Ninth Circuit, reflecting remarkable consistency in its hostility to petitioners' positions, reversed and held in a brief per curiam opinion that denial of equitable relief was an abuse of discretion and remanded "for entry of an order directing the State and County to disgorge the improperly collected taxes." App. 12. The court of appeals did not analyze the various issues closely but, as in *Crow III*, concluded that the outcome of the case essentially had been determined by its prior appellate decisions – two of which addressed the issue of preemption and the third of which relied on the first two. App. 7-8.

Most fundamentally, the Ninth Circuit, citing to its decision in *Crow III*, held that the Tribe had stated a claim for equitable relief "*despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust.*" App. 8 (emphasis added). It then added that the Tribe and the United States were entitled to relief "even though there was no privity and even though the Tribe itself had not paid the taxes to the State." *Id.* The court further found misplaced petitioners' reliance on this Court's decision in *United States v. California*, 507 U.S. 746 (1993). In a footnote, as modified in response to petitioners' petition for rehearing, the court of appeals determined *California* to be "inapplicable" because in that case this Court had found that

> California could only be liable if it were somehow responsible for the wrongful act of a third party and there was no finding that California had wrongfully or illegally collected taxes. In this case, however, the illegality of Montana's taxes was established in *Crow I* and *Crow II*; Montana need not be held responsible for another party's wrongdoing for liability to attach.
>
> *California* involved an entirely different factual situation: a claim of restitution by the Government where the Government had voluntarily agreed to reimburse a contractor subject to a state tax. The Government, unlike the Tribe, was "in no better position than as a subrogee of its contractor," . . . and the Supreme Court held that "the Government cannot use the existence of an obligation to indemnify [a contractor] to create a federal cause of action for money had and received to recover state taxes paid by [the contractor].

App. 8 n.2 & 16 (citations omitted). Having held that the Tribe could state a claim for equitable relief notwithstanding the absence of the traditional elements necessary for such relief, the Ninth Circuit proceeded, without articulating any standards, to reverse each of the district court's findings concerning the various equitable factors it considered.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision constitutes an extraordinary and unprincipled expansion of quasi-contractual relief with potentially broad implications in an area where this Court has devoted substantial attention over the last 25 years – the authority of States to tax in Indian country. It is extraordinary because no court – except the Ninth Circuit here – has ever held that third parties such as respondents have a right to recoup tax monies paid to

a governmental entity when the taxpayer itself admittedly has no right to recovery. The decision is unprincipled because it is directly contrary to this Court's holding in *United States v. California*, 507 U.S. 746 (1993), as well as the decision of the Tenth Circuit in *Ute Indian Tribe v. State Tax Commission*, 574 F.2d 1007 (10th Cir.), *cert. denied*, 439 U.S. 965 (1978), which recognized that the common law action in assumpsit for money had and received is a means for *taxpayers*, not *third parties*, to recover unlawful exactions.

The Ninth Circuit's decision has far-reaching practical consequences. First, the monetary stakes here are enormous, and no reason exists to believe they will be any less so in future cases involving other States. The court of appeals ordered petitioners to "disgorge" $58.2 million and additionally ordered the district court to adjudicate the respondents' request for prejudgment interest, which respondents claimed as $257.3 million during the 1994 trial. These are remarkable sums, particularly when most (in the case of Montana) or all (in the case of Big Horn County) of the tax payments have long since been expended to provide government services, including a full range of services to tribal members whether residing on or off the Reservation. Second, leaving the decision unreviewed invites similar challenges, with the possibility of protracted and, if the court of appeals' analytical approach is adopted, virtually standardless adjudication of liability. That result runs counter to this Court's efforts to formulate concrete rules governing the state taxation authority in Indian country and thereby minimize litigation over such issues.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *CALIFORNIA*.

The Tribe and the United States pressed assumpsit and constructive trust causes of action below. These claims at bottom were requests for different remedies based upon establishing a quasi-contractual right of restitution to Westmoreland's severance and gross proceeds tax payments.[4] The Ninth Circuit's holding, originally in *Crow III* and subsequently in *Crow IV*, that the Crow Tribe could pursue its claims despite the fact that Westmoreland paid the taxes pursuant to a state statute and had no legal claim against petitioners conflicts directly with this Court's decision in *United States v. California*, 507 U.S. 746 (1993).

A. In *California*, the United States sued California claiming that it was entitled, based on the federal common law cause of action for money had and received, to recover taxes alleged to have been assessed improperly under state law against a government contractor – Williams Brothers Engineering Company ("WBEC"). 507 U.S. at 748. WBEC paid the taxes under protest, using funds provided by the Government pursuant to a contractual agreement. *Id.* at 749. It subsequently settled the dispute

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[4] *Restatement of Restitution* § 160, cmt. a (1971) ("a quasi-contractual obligation and a constructive trust closely resemble each other, the chief difference being that the plaintiff in bringing an action to enforce a quasi-contractual obligation seeks to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money, whereas the plaintiff in bringing a suit to enforce a constructive trust seeks to recover specific property"); I George E. Palmer, *Law of Restitution* § 1.3, at 13 (1978) ("Palmer") (same).

with the State for $3 million out of $14 million in taxes paid. *Id.* The United States then sought the remainder on the theory that its obligation to reimburse WBEC created a quasi-contractual relationship with California so as to allow recovery.

This Court unanimously rejected the Government's position. It held that "[i]n this case . . . the taxpayer – WBEC – has had its day in court and gone home. The Government attempts to recover money it paid in reimbursement for state tax assessments against the contractor, even though the contractor already has challenged the assessment and accepted a resolution of its claims." 507 U.S. at 752. As a result, it concluded that "[e]ven assuming that federal courts may entertain a common law action for the recovery of state taxes paid by the Government, . . . a federal action is inappropriate here because the Government is in no better position than as subrogee of its contractor." *Id.* at 752. Or, put another way, even though it was obligated to indemnify WBEC, "the Government [could not] use the existence of [that] obligation . . . to create a federal cause of action for money had and received to recover state taxes paid by WBEC." *Id.* at 754.

In so holding, the Court expressly distinguished a short line of cases in which it had held that a federal common law cause of action for money had and received could be stated. According to this Court, those cases, including *Bayne v. United States*, 93 U.S. 642 (1877), and *Gaines v. Miller*, 111 U.S. 395 (1884), shared two common features. First, in each case, "the rightful owner of the money lost it by way of theft." 507 U.S. at 755. Second, in each case, the rightful owner sued a third party who was

legally responsible for the actions of the one who unlawfully took the money. *Id.*

Neither *Bayne* nor *Gaines* controlled the outcome in *California* because WBEC had not stolen the money it used to pay the taxes and, in any event, California did not have a relationship with WBEC that would make it legally responsible for WBEC's actions. "In fact, California and WBEC had an adverse relationship: that of creditor and debtor." 507 U.S. at 756. In such circumstances, the Court held that it would "not imply a contract in law between California and the Government." *Id.* at 756. And, "without an implied contract, an action for money had and received will not lie against the State." *Id.*[5]

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[5] This Court's decision in *California* was based on a straightforward application of the common law. Claims in quasi-contract for money had and received were recognized at common law by this and other courts as a means for recovering illegal taxes paid under duress and protest. *See, e.g., Stone v. White*, 301 U.S. 532, 534 (1937); *Saltonstall v. Birtwell*, 164 U.S. 54, 71 (1896); *City of Philadelphia v. Collector*, 72 U.S. 720, 731-32 (1866); *see generally* II Palmer § 9.16; Thomas M. Cooley, *Law of Taxation* 1487-90 (Albert Poole Jacobs ed., 1903). Recovery under this theory ordinarily was limited to the statutorily prescribed taxpayer or "payor" (*Restatement* § 75). An exception to the normal rule was developed in some states, including Montana, when a taxpayer mistakenly paid taxes to one taxing jurisdiction under a statute requiring them to be paid to another taxing jurisdiction; in that instance, the entity entitled to the taxes under the statute could seek recovery against the entity which mistakenly received them. *Valley County v. Thomas*, 97 P.2d 345, 366 (Mont. 1939). As the district court correctly found, that exception had no application here. App. 49-50 (COL ¶ 25).

B. The Ninth Circuit's attempt to distinguish – and more realistically to evade – *California* betrayed a fundamental misunderstanding of that decision. As discussed, the panel interpreted *California* to turn not on whether the Government could state a claim in quasi-contract but rather on whether California had somehow acted improperly. The panel then reasoned that, by contrast, "the illegality of Montana's taxes was established in *Crow I* and *Crow II*; Montana need not be held responsible for another party's wrongdoing for liability to attach." 98 F.3d at 1195 n.2. The Ninth Circuit also held that *California* involved an "entirely different" set of facts. Without any explanation, it stated that "unlike the Tribe" in this case, the United States in *California* was in no better position than a subrogee of the taxpayer. *Id.*

Neither of these "distinctions" makes any difference to the proper legal analysis in this case. *California* did not turn on whether the State had acted improperly; instead, it turned on the rule that the Government had no claim in quasi-contract to recover taxes paid by a third party which had waived its right to recoupment. Put another way, the fact that the Government had no claim in quasi-contract had nothing to do with whether the taxes at issue were lawfully collected from the actual taxpayer. Respondents – both third parties to the taxpayer-State relationship here – are situated no differently than the Government was in *California*: without a claim in quasi-contract for recoupment of taxes assessed upon and paid by another. *See* App. 178-80 (conclusion in *Crow I* that legal incidence of tax fell on Westmoreland, not the Tribe).

Second, the Ninth Circuit's suggestion that the respondents have a *better* claim to recoupment in this case than the United States did in *California* – where the Government predicated its quasi-contract claim squarely on the ground that WBEC had used federal funds to pay the taxes (Brief for United States at 16-17, *United States v. California, supra*) – makes no sense. Precisely the opposite is true. Here, unlike in *California*, respondents had *no* obligation to reimburse Westmoreland for the taxes it paid. They are consequently in no better position to recoup the taxes paid – and in fact are in a substantially worse position – than was the Government in *California*. Indeed, it is plain that, even under the legal theory advanced unsuccessfully by the United States in *California*, no entitlement to quasi-contractual relief is available in this matter given the absence of reimbursement.

Finally, even if the Ninth Circuit's footnote concerning *California* is viewed as an inartful effort to fit this case into the *Bayne - Gaines* exception to the *California* rule, the present matter still cannot be distinguished from *California*. There neither was, nor could have been, any suggestion that Westmoreland took money unlawfully from the Tribe to pay the taxes, since Westmoreland used its own funds to discharge the tax obligations. Moreover, even had tribal funds been used to pay the taxes, the relationship between Westmoreland and petitioners was still adversarial. It was, in other words, the very same creditor-debtor relationship that this Court recognized as "adverse" in *California*.

In short, the material facts here are substantively indistinguishable from those in *California*: this case, like *California*, involves an effort by third parties to recoup

taxes paid by a taxpayer who stood in an adverse relationship to the taxing entity but who eventually forfeited any claim to the taxes sought by the third party. As such, the court of appeals was obligated to follow this Court's decision in *California*, but it did not. The decision leaves States within the Ninth Circuit subject to one version of the law, while the remainder of the country is subject to another founded on fidelity to *California*. This Court should grant certiorari to resolve that unacceptable situation.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE TENTH CIRCUIT'S DECISION IN *UTE INDIAN TRIBE* v. *STATE TAX COMMISSION*.

The Ninth's Circuit's decision also conflicts with the holding of the Tenth Circuit in *Ute Indian Tribe v. State Tax Commission*, 574 F.2d 1007 (10th Cir.), *cert. denied*, 439 U.S. 965 (1978). The *Ute* case involved a tribe's claim that a Utah sales tax imposed on consumers but collected by a tribal retailer for remittance to the State was preempted. In addition to prospective injunctive relief, the Tribe requested return of sales taxes it previously had collected and remitted to the State.

The court of appeals held the tax preempted insofar as it was imposed on Indians. 574 F.2d at 1009. Nonetheless, although it granted certain prospective relief, the court rejected the tribe's claim for recoupment in its entirety, reasoning that because "these funds now in the hands of the State were paid by buyers of the goods and not by the sellers[,] . . . [i]f anyone can seek recovery or refund, it is these *buyers*." *Id.* (emphasis added). The

Tenth Circuit accordingly recognized that the Ute Tribe could not recover the taxes at issue since it was not the taxpayer. This result cannot be reconciled with that below, where the Crow Tribe did not possess even the status of a collector and remitter of taxes paid by another. This Court should grant certiorari to resolve the conflict between these two contradictory holdings.

III. THE NINTH CIRCUIT'S DECISION HAS EXCEPTIONAL LIABILITY CONSEQUENCES NOT ONLY FOR THE PETITIONERS BUT ALSO FOR ALL STATES THAT TAX TRANSACTIONS IN INDIAN COUNTRY.

The Ninth Circuit's decision additionally warrants review because it has exceptional public importance. The court of appeals' reasoning carries with it the possibility of enormous liability not only for petitioners but also, at the very least, for other States or local governments within the Ninth Circuit. Even though the only damages the Tribe conceivably could have suffered relate to the diminished royalty payments it may have received from Westmoreland, the Tribe and the United States sought at the 1994 trial a total of $315.5 million in tax payments and prejudgment interest on those payments. Their claim undoubtedly has grown with the passage of time and accrual of additional interest. The enormous fiscal impact that such a judgment would have on the operations – and citizens – of Montana and Big Horn County is self-evident. The court of appeals' reasoning, moreover, is not restricted to this case; it provides a blueprint for tribes and the United States to seek similar relief against other States and their political subdivisions. Indeed, the stakes

are sufficiently high that similar claims are a virtual certainty.

The Ninth Circuit's decision is especially dangerous because it is standardless. Under its approach, if a state statute is successfully challenged on preemption grounds by a tribe, the State and its political subdivisions may be held liable to the tribe for taxes paid by third parties based on nothing more than a federal court's perception of competing equities. As this case makes clear, that standard is, in fact, no standard at all, since different federal judges may form very different conclusions about the "equities" of the case.

Such a result is untenable. This Court has long recognized the need for reasonably certain outcome-determinative rules where state Indian country taxation authority is at stake. In *County of Yakima v. Confederated Tribe & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), for example, it rejected the court of appeals' adoption of an ad hoc approach for determining the taxability of tribal fee-owned property, remarking that "[i]f the Ninth Circuit's . . . test were the law, litigation would surely engulf the states' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel." *Id.* at 267-68. The Court reiterated this point several years later in *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S. Ct. 2214 (1995), in finding unpersuasive a State's suggestion that Indian country preemption analysis should focus not on the legal incidence of a tax but on the extent to which tribal retailers actually bore the tax's economic burden:

> [O]ur focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. The factors that would enter into an inquiry of the kind the State urges are daunting. If we were to make "economic reality" our guide, we might be obligated to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume – a complicated matter dependent on the characteristics of the market for the relevant product.

Id. at 2221. The court of appeals' approach invites just such a complex, case-by-case weighing of poorly defined considerations by district courts that, as demonstrated by its decision, would be subject to wholesale revision by appellate courts with a different view of how the equities should be assessed.

The court of appeals' decision thus not only imposes a entirely new form of liability on petitioners, and presumably on States in general, but also establishes an essentially standardless analysis through which liability is to be determined, thereby ensuring high stakes litigation of the kind found here. The untoward practical consequences of the result below are compounded, of course, by the Ninth Circuit's convoluted effort to evade the clearly controlling nature of this Court's decision in *California* and by the conflict now existing with the Tenth Circuit's opinion in *Ute Indian Tribe*. Because the court of appeals' decision has fiscally devastating consequences, disregards *California* and is irreconcilable with *Ute Indian Tribe*, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS, *Plaintiff-Appellant,* and UNITED STATES OF AMERICA, *Plaintiff-Intervenor,* v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, *Defendants-Appellees.*	No. 95-35093 D.C. No. CV-78-00110-BLG
THE CROW TRIBE OF INDIANS, *Plaintiff,* and UNITED STATES OF AMERICA, *Plaintiff-Intervenor-Appellant,* v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, *Defendants-Appellees.*	No. 95-35096 D.C. No. CV-78-00110-JDS OPINION

Appeals from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
January 9, 1996 – Seattle, Washington

Filed August 6, 1996

Before: James R. Browning, Eugene A. Wright, and
William C. Canby, Jr., Circuit Judges.

Per Curiam

SUMMARY

Tax/Government Law/Native Americans

The court of appeals reversed a district court order and remanded. The court held that denial of equitable relief was an abuse of discretion in a case in which a tribe sought restitution of monies paid to a state and county under unlawful taxes, where nearly all of the equitable considerations advanced in support of the retention of the unlawful taxes by the state were rejected explicitly or rendered irrelevant by the court of appeals' previous decisions.

Appellee the State of Montana imposed severance and gross proceeds taxes on coal produced from appellant the Crow Tribe of Indians' coal deposits. The Tribe, and the United States as its trustee, brought suit challenging Montana's taxes on preemption and tribal sovereignty grounds. The court of appeals, in *Crow I*, held that the complaint stated a cause of action. After trial, the court of appeals held, in *Crow II*, that the Tribe established both

that the taxes impermissibly eroded its sovereign authority and that they interfered with the policy of promoting tribal self-government and economic development underlying the Indian Mineral Leasing Act of 1938, were not narrowly tailored to achieve Montana's legitimate interests, and were therefore preempted by the federal statute. The district court awarded the Tribe over $23 million in severance taxes that the Tribe's coal lessee, Westmoreland Resources, Inc., had paid into the court's registry after 1982.

The Tribe sought restitution of all monies paid to the State and appellee the County of Big Horn under the unlawful taxes since 1975 – approximately $46 million of severance taxes and $11 million of gross proceeds taxes – on the theory that Montana had been unjustly enriched at the Tribe's expense. The Tribe also sought damages for interference with its contractual relations with another lessor, Shell Oil Co. The district court denied a motion to dismiss the claim for restitution and certified the order for interlocutory appeal. After initially granting leave to appeal, the court of appeals held that leave was improvidently granted and dismissed the appeal.

After a trial, the district court denied relief, weighing the equities and determining that the Tribe was not entitled to restitution under theories of assumpsit or constructive trust or to damages for interference with contract. The court found that lack of privity between the Tribe and Westmoreland and Westmoreland's failure to pursue its own remedies against the State militated against relief, and that the fact that Westmoreland, and not the Tribe, paid the taxes had a place in determining

restitution damages. The court also weighed in Montana's favor the facts that similar taxes are not always preempted and that the Montana taxes withstood a Commerce Clause challenge. The court relied on the fact that Montana provided general government services to the Tribe as a factor weighing against restitution. The court denied restitution in part because the Tribe could not show it would have collected taxes from Westmoreland if Montana had not taxed the coal. The Tribe appealed.

[1] The district court failed to give appropriate weight to the law of this case as established in three prior appeals. In the process of weighing the equities in favor of and against restitution, the district court in effect reconsidered questions of law already decided by the court of appeals in the prior appeals. Nearly every factor relied upon by the district court to determine that the Tribe was not entitled to relief was either contradicted or made irrelevant by earlier holdings of the court of appeals.

[2] In *Crow III* the court of appeals held that the Tribe stated a claim for equitable relief despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust. By denying relief in part because of lack of privity and the fact that Westmoreland and not the Tribe paid the taxes, the district court in effect reinstated the privity requirement that the court of appeals had already rejected in *Crow III* and ignored the law of the case.

[3] The district court failed to follow the court of appeals' earlier holdings when it considered whether the

State acted with wrongful intent. The district court concluded that the record did not support a conclusion that the taxes "were levied with an unlawful purpose," although the court of appeals had already found that the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal on a ceded strip.

[4] The district court improperly minimized the weight to be given the Tribe's interest in raising revenue from its mineral resources. [5] In *Crow II*, the court of appeals held that the only legitimate State interest that could justify taxes on Crow coal was the provision of *coal related* services.

[6] The court of appeals held in *Crow II* that the Tribe was harmed by the State's enrichment whether or not the Tribe could have imposed its own taxes.

[7] Denial of equitable relief was an abuse of discretion. [8] Remand was warranted for entry of an order directing the State and County to disgorge the improperly collected taxes.

[9] The district court properly concluded that the Tribe failed to show the Montana taxes caused the Tribe to lose its lease with Shell.

COUNSEL

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Clay R. Smith, Assistant Attorney General, Helena, Montana, for the defendants-appellees.

Elizabeth Ann Peterson, United States Department of Justice, Washington, D.C., for the plaintiff-intervenor-appellant.

OPINION

PER CURIAM:

In 1975, Montana imposed severance and gross proceeds taxes on coal produced from Crow Tribe coal deposits. Mont. Code Ann. §§ 15-35-101 through 205; §§ 15-23-701 through 703. The Tribe, and the United States as its trustee,[1] instituted suit challenging Montana's taxes on preemption and Tribal sovereignty grounds. We held the complaint stated a cause of action. *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981), *as amended*, 665 F.2d 1390 (9th Cir. 1982) ("*Crow I*"). After trial, we held the Tribe had established both that the taxes impermissibly eroded the Tribe's sovereign authority and that they interfered with the policy of promoting tribal self-government and economic development underlying the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-g, were not narrowly tailored to achieve Montana's legitimate interests, and were therefore preempted by the federal statute. *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd without opinion*, 484 U.S. 997 (1988) ("*Crow II*").

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[1] Subsequent references to the Tribe include the trustee.

After *Crow II*, the district court awarded the Tribe over $23,000,000 in severance taxes that the Tribe's coal lessee, Westmoreland Resources, Inc., had paid into the court's registry after 1982. The Tribe then sought restitution of all monies paid to the State and County under the unlawful taxes since 1975 – approximately $46,000,000 of severance taxes and $11,000,000 of gross proceeds taxes – on the theory that Montana had been unjustly enriched at the Tribe's expense. The Tribe also sought damages for interference with the Tribe's contractual relations with another lessor, Shell Oil Company. The district court denied the defendant's motion to dismiss the claim for restitution and certified the order for interlocutory appeal. After initially granting leave to appeal, we held that leave was improvidently granted and dismissed the appeal on the ground that the State's contention in opposition to the Tribe's request for relief – that "there must be, if not privity, then a duty *inter sese* between the interests of the Crow Tribe and the money collected from a third person by Montana's void tax" – had already been resolved against the State by *Crow II*. *Crow Tribe of Indians v. State of Montana*, 969 F.2d 848, 848 (9th Cir. 1992) ("*Crow III*"). After trial, the district court denied relief, weighing the equities and determining that the Tribe was not entitled to restitution under theories of assumpsit or constructive trust or to damages for interference with contract.

I. Restitution

[1] The district court's thoughtful discussion reflects the care with which it addressed the issue of

restitution. Nonetheless, the court failed to give appropriate weight to the law of this case as established in the three prior appeals. In the process of weighing the equities in favor of and against restitution, the district court in effect reconsidered questions of law already decided by this Court in the prior appeals. Nearly every factor relied upon by the district court to determine that the Tribe was not entitled to relief is either contradicted or made irrelevant by our earlier holdings.

A.

[2] The district court found that lack of privity between the Tribe and Westmoreland and Westmoreland's failure to pursue its own remedies against the State militated against relief, and that the fact that Westmoreland, rather than the Tribe, paid the taxes "[had] its place in determining restitution damages." However, we held in *Crow III* that the Tribe stated a claim for equitable relief despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust; that is, even though there was no privity and even though the Tribe itself had not paid the taxes to the State. *Crow III*, 969 F.2d at 848-49; *see also Crow II*, 819 F.2d at 899; *cf. FDIC v. British-American Corp.*, 755 F. Supp. 1314, 1324 (E.D.N.C. 1991) (to recover for unjust enrichment plaintiff must show plaintiff conferred benefit on defendant).[2] By

[2] Montana's arguments to the contrary are similarly precluded by *Crow III*. The requirements for equitable relief set out in *United States v. California*, 507 U.S. 746 (1993) are inapplicable. In that case, California could only be liable if it were somehow responsible for the wrongful act of a third party and there was no finding that California had wrongfully or illegally collected taxes. In this case, however, the illegality of Montana's taxes was established in *Crow I* and *Crow II*; Montana need not be held responsible for another party's wrongdoing for liability to attach.

denying relief in part because of lack of privity and the fact that Westmoreland and not the Tribe had paid the taxes, the district court in effect reinstated the privity requirement we had already rejected in *Crow III* and ignored the law of the case.

B.

[3] The district court failed to follow our earlier holdings when it considered whether the State acted with wrongful intent. The court weighed in Montana's favor the fact that similar taxes are not always preempted, *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989), and that the Montana taxes had withstood a Commerce Clause challenge, *see Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), presumably as indications that Montana could not have known the taxes it imposed on the severance and sale of the Tribe's coal were unlawful. Yet the court ignored direct evidence that the Montana legislature was aware that the taxes were potentially preempted and expected "court decreed settlements" would be required to resolve their legality.[3] The court concluded the record did not support a conclusion that

[3] Despite this foreknowledge, Montana did not place the contested taxes in escrow until well after this suit was underway or take other steps to mitigate any hardship it might face if the taxes were held invalid. *Cf. McKesson Corp. v. Florida Alcohol and Tobacco Div.*, 496 U.S. 18, 45 (1990).

the taxes "were levied with an unlawful purpose," although we had already found the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal on the ceded strip. *Crow I*, 650 F.2d at 1113, 1114.

The district court intimated that the taxes were not wrongful at all, since the severance tax withstood a Commerce Clause challenge in *Commonwealth Edison;* the district court found "the principles of *Commonwealth Edison* . . . relevant, although not determinative," even though we had noted in *Crow I* that the preemption inquiry raises "[c]ompletely different considerations" from those involved in *Commonwealth Edison*. *Crow I*, 665 F.2d at 1391. Whether or not the tax discriminates against interstate commerce is hardly relevant to the State's culpability for imposing a tax that impinges on Tribal sovereignty and is preempted by federal law.

C.

[4] The court improperly minimized the weight to be given the Tribe's interest in raising revenue from its mineral resources. We had stated in *Crow II* that "[c]oal production is vital to the economic development of the Crow Tribe[and] . . . generate[s] funds for essential Tribal service[s]," 819 F.2d at 901 (quotation omitted), and noted that the Tribe's interest in coal tax revenue was particularly significant in view of the federal interest in Tribal economic development and self sufficiency. *Id.* at 898.

[5] The district court relied on the fact that Montana provided general government services to the Tribe as a factor weighing against restitution, but we had held in

Crow II that the only legitimate State interest that could justify taxes on Crow coal was the provision of *coal related* services. *Id.* at 901-902. Moreover, provision of general services could not offset the Tribe's revenue loss because the district court found the State would have provided such services even if the Tribal coal had not been mined.

Even provision of coal-related services should not weigh against restitution in this case since there was uncontroverted evidence that coal-related taxes other than the severance and gross proceeds taxes generated far more income for Montana than Montana spent to support coal mining. Thus, even without the severance and gross proceeds taxes, Montana did not suffer financially because Crow coal was mined. *See id.* at 901.

D.

[6] The district court denied restitution in part because the Tribe could not show it would have collected taxes from Westmoreland if Montana had not taxed the coal. But we had held in *Crow II* that the Tribe was harmed by the State's enrichment whether or not the Tribe could have imposed its own taxes, because the taxes imposed by Montana had an adverse impact on the Tribe's ability to market its coal, increased the costs of coal production, and reduced the royalty the Tribe could charge, "taking revenue that would otherwise go towards supporting the Tribe and its programs." *Id.* at 899-900, 902-03.

The district court reasoned that Westmoreland would not have paid the taxes to the Tribe from 1975-1982 because the Department of the Interior had not approved

the tribal tax. The court had earlier found that Westmoreland would have paid the tribal tax even without approval because it agreed to do so in its 1982 lease. However, Westmoreland was willing to pay coal taxes to the Tribe as early as 1976, so there was no reason for the court to distinguish between the taxes collected before and after 1982.

E.

[7] We conclude denial of equitable relief was an abuse of discretion. Nearly all of the equitable considerations advanced in support of the retention of the unlawful taxes by the State were rejected explicitly or rendered irrelevant by this court's previous decisions. The equities in favor of restoring improperly collected revenues to the entity entitled to receive them are strong. Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

[8] We remand for entry of an order directing the State and County to disgorge the improperly collected taxes. The court should also consider the plaintiffs' unresolved request for pre-judgment interest.

II. Interference with Contract

We held in *Crow II* that Montana's coal taxes "impair[ed] the tribe's ability to negotiate leases with Shell Oil and other coal companies." *Crow II*, 819 F.2d at

903; *see also Cotton Petroleum*, 490 U.S. at 186-87 n.17. On remand, the Tribe sought restitution of monies lost as a result of the State's interference with the Tribe's lease negotiations with Shell. The Tribe alleged the high taxes imposed by the State on the sale and severance of the Tribe's coal made it impossible for the Tribe to renegotiate its 1972 lease with Shell and Shell's would-be customers purchased their requirements from other sources which paid severance and gross proceeds taxes to Montana. The Tribe asked the court to declare a constructive trust on taxes collected by Montana on sales of coal to the lost Shell customers, an amount exceeding $250,000,000. The district court considered the Tribe's claim but rejected it.

[9] The district court did not err. Whether the Tribe's claim is viewed as a state law tort or a request for equitable relief, the Tribe must show that Montana's taxes on the Tribe's coal caused the breakdown in the Tribe's relationship with Shell.[4] The district court found that although taxes may have impaired the Tribe's ability to lease its coal, they were only one factor in the failure of lease negotiations, and other factors were clearly more

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[4] The Tribe's argument that Montana should bear the burden of proving that the unlawful taxes did *not* cause the harm is unpersuasive. The Supreme Court's statement in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946), that the "wrongdoer shall bear the risk of the uncertainty which his own wrong has created" applies only to proof of the amount of damages, and does not dispense with the requirement that the plaintiff establish causation. The Tribe has offered no reason to extend to this area the Supreme Court's analysis of proof of causation in securities cases, set out in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381-85 (1970).

influential: the Tribe itself repudiated Shell's 1972 lease before the state taxes were imposed, and in 1976 the Tribe successfully sued to invalidate the lease on the ground that the Department of Interior had approved it without making certain findings required by law. Other evidence showed that Shell officials were concerned about internal conflicts among the Tribe's leaders and disputes as to who had authority to represent the Tribe in negotiations with Shell. The district court properly concluded the Tribe failed to show the Montana taxes caused the Tribe to lose its lease with Shell.

III.

Whether the Tribe is entitled to attorney's fees under 42 U.S.C. § 1988 as the prevailing party in *Crow II* is not before us. The Tribe raised the issue but the district court did not reach it.

REVERSED and REMANDED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS, *Plaintiff-Appellant,* and UNITED STATES OF AMERICA, *Plaintiff-Intervenor,* v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, *Defendants-Appellees.*	No. 95-35093 D.C. No. CV-78-00110-BLG

THE CROW TRIBE OF INDIANS, *Plaintiff,* and UNITED STATES OF AMERICA, *Plaintiff-Intervenor-Appellant,* v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, *Defendants-Appellees.*	No. 95-35096 D.C. No. CV-78-00110-JDS ORDER

Filed October 29, 1996

Before: James R. Browning, Eugene A. Wright, and William C. Canby, Jr., Circuit Judges.

ORDER

The motion to recall the mandate is granted.

The petition for rehearing received on September 18, 1996, is accepted for filing.

The opinion is amended by adding to the end of footnote 2:

> Montana also argues in its petition for rehearing that this case presents a weaker case for quasi-contractual relief than *California*, where restitution was denied, because the Tribe did not transfer any resources to the State. But *California* involved an entirely different factual situation: a claim of restitution by the Government where the Government had *voluntarily* agreed to reimburse a contractor subject to a state tax. The Government, unlike the Tribe, was "in no better position than as a subrogee of its contractor," *id.* at 1788, and the Supreme Court held that "the Government cannot use the existence of an obligation to indemnify [a contractor] to create a federal cause of action for money had and received to recover state taxes paid by [the contractor]." *Id.* at 1789.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, vs. **UNITED STATES OF AMERICA,** Plaintiff-Intervenor, vs. **STATE OF MONTANA; MICHAEL J. ROBINSON,** Director, Montana Department of Revenue; **BIG HORN COUNTY, MONTANA; MARTHA FLETCHER,** Treasurer, Big Horn County, Montana, Defendants.	Cause No. CV 78-110-BLG-JDS **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT** ********** (Filed Nov. 23, 1994)

I.

FINDINGS OF FACT

PARTIES

1. Plaintiff Crow Tribe of Indians (Tribe) is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

2. Plaintiff-intervenor United States holds in trust, and the Tribe is the beneficial owner of, large amounts of coal resources underlying the Crow Indian Reservation and the Ceded Strip. The United States supervises the development of the Tribe's mineral resources through the Department of Interior and the Bureau of Indian Affairs.

3. Defendant State of Montana is a sovereign state of the Union, admitted pursuant to the **Enabling Act** of February 22, 1889. 22 Stat. 676.

4. Defendant Michael J. Robinson is Director of the Montana Department of Revenue and, as such, is charged under Montana law with the enforcement and collection of the Montana Coal Severance Tax. M.C.A. §§ 15-35-101 - 205 (1993). He is sued in his official capacity.

5. Defendant Big Horn County, Montana is a political subdivision of Montana. Most of the Crow Indian Reservation and the Tribe's coal resources, including Westmoreland Resources, Inc.'s (Westmoreland) Absaloka Mine, are encompassed within the exterior boundaries of Big Horn County.

6. Defendant Martha Fletcher is the Treasurer of Big Horn County. She is charged under Montana law with the enforcement an [sic] collection of the Montana Gross Proceeds Tax, M.C.A. §§ 15-23-701 - 703 (1993). She is sued in her official capacity.

PROCEDURAL AND FACTUAL OVERVIEW

7. Vast deposits of coal underlie both the Crow Indian Reservation proper and the adjacent area known as the Ceded Strip. The Ceded Strip consists of about

1,137,500 acres originally part of the reservation. The Tribe ceded its interest in the surface estate of this area to the United States in 1904 pursuant to the **Act** of April 27, 1904, Chapter 1624, 33 Stat. 352, in order to open the area to non-Indian entry and settlement. Although surface interests were thereafter conveyed to non-Indians, rights to the underlying minerals are held by the United States government in trust for the Tribe.

8. To date, only Westmorcland has actually mined coal under leases with the Tribe. Westmoreland's facility is known as the Absaloka Mine.

9. In 1975, Montana enacted statutes imposing a severance tax and a gross proceeds tax on coal produced in the state. M.C.A. §§ 15-35-101 - 111 and 15-23-701 - 704. Pursuant to these statutes, Westmoreland began paying Montana's severance and gross proceeds taxes in 1975.

10. In January of 1976, the Tribe enacted its own legislation imposing a severance tax of 25 percent on the contract value of coal mined on the reservation.

11. The Tribe, in 1978, filed this lawsuit seeking a declaration that the Montana taxes were preempted from application to coal production on the Crow Indian Reservation and the Ceded Strip.

12. The United States intervened in support of the Tribe's claims to protect its interests as a trustee of the coal upon which the taxes were levied. Westmoreland, the operator of the Absaloka Mine, located on the Ceded Strip, and a party to coal lease arrangements with the Tribe, was also granted leave to intervene as a defendant. In that capacity, Westmoreland counterclaimed against

the Tribe for a declaratory judgment that the Ceded Strip surface and subsurface were outside the reservation and the Tribe lacked power to tax mining activities there. Westmoreland also cross-claimed against the state and county defendants, seeking a declaration that the severance and gross proceeds taxes were preempted with respect to the Ceded Strip mining activities under its lease with the Tribe. It also sought corresponding injunctive relief.

13. This Court dismissed the second amended complaint in April of 1979 for failure to state a claim. ***Crow Tribe v. Montana,*** 469 F.Supp. 154 (D. Mont. 1979). On appeal, this judgment was reversed and the matter remanded for further proceedings. ***Crow Tribe v. Montana,*** 650 F.2d 1104 (9th Cir. 1981), *amended* 665 F.2d 1390 (***Crow I***), *cert. denied* 459 U.S. 916 (1982).

14. In 1982, the Tribe enacted a severance tax for coal mined on the Ceded Strip. The Department of Interior did not approve this tax in light of questions over the Tribe's authority to tax such activities on the Ceded Strip.

15. Westmoreland paid the severance and gross proceeds taxes to Montana and Big Horn County between 1975 and September of 1982. The Tribe and Westmoreland, in 1982, moved to enjoin the collection of the state taxes and allow Westmoreland to pay the equivalent of the taxes into this Court's registry pending resolution of the issue as to whether Montana's taxes were valid. This Court eventually granted this motion.

16. In November of 1982, a third amended complaint was filed in this matter, seeking, in addition to declaratory and injunctive relief, restitution of illegally

collected taxes and imposition of a constructive trust on the amount of these taxes for the benefit of the Tribe. Westmoreland, for its part, sought recovery of state taxes paid prior to September 29, 1982, the effective date of an amended lease with the Tribe.

17. Trial was held in January of 1984. This Court entered findings of fact and conclusions of law, together with a judgment for defendants, in September of 1985. ***Crow Tribe v. Montana,*** 657 F.Supp. 573 (D. Mont. 1985). This Court concluded that the Montana coal severance and gross proceeds taxes were valid as applied to the production of coal held by the United States in trust for the Tribe on the Ceded Strip. This ruling made Tribe's resolution of the restitution claims concerning taxes paid by Westmoreland between 1975 and 1982 unnecessary.

18. In June of 1987, the Court of Appeals reversed this Court's judgment and ruled that Montana and Big Horn County's taxes are preempted by federal law and policies, and void for interfering with tribal self-government. ***Crow Tribe v. Montana,*** 819 F.2d 895 (9th Cir. 1987) (***Crow II***). The Supreme Court summarily affirmed this decision in January of 1988. ***Montana v. Crow Tribe,*** 484 U.S. 997 (1988) (per curiam).

19. In October of 1989, the Tribe filed its fourth amended complaint for restitution, seeking a judgment equal to all severance taxes paid between 1975 and 1982, and all gross proceeds taxes paid between 1975 and 1988, together with the interest thereon from the dates paid.

20. Defendants moved for summary judgment, which was denied in December of 1990. The United States

was authorized to file a first amended complaint substantively identical to the Tribe's fourth amended complaint.

21. Defendants requested leave to pursue an interlocutory appeal. This Court certified for interlocutory appeal its denial of defendants' motion to dismiss for failure to state a claim upon which relief can be granted. The Court of Appeals granted permission for the appeal on July 17, 1991, but then determined that said permission was improvidently granted and dismissed the appeal. ***Crow Tribe v. Montana***, 969 F.2d 848 (9th Cir. 1992) (per curiam) (***Crow III***).

22. The parties have stipulated to Westmoreland's dismissal as a defendant and to its counterclaim against the Tribe and cross-claim against the defendants.

23. Plaintiffs assert that the Montana taxes have unjustly enriched Montana at the expense of the Tribe in two ways. The first is that the severance taxes in the amount of 46.8 million dollars paid to Montana between July 1, 1975 and June 30, 1982, and the gross proceeds taxes of 11.4 million dollars paid to Big Horn County between 1975 and 1987, were illegally collected and should be awarded to the United States in trust for the Tribe, with interest. The second is that by imposing taxes on Crow coal, Montana unlawfully interfered with the Tribe's business and contractual relationship with Shell Oil Company, resulting in lost revenues to the Tribe and increased revenues for Montana.

24. Trial was held before this Court on April 18 - 20 and May 2 - 4, 1994. The issues and evidence presented at trial were framed by this Court's Memorandum, Opinion and Order of December 26, 1990. As to the plaintiff's

equitable restitution claim, I found, in the 1990 Opinion, there is a question of fact where the equities lie in this case and I set forth equitable considerations important for me to consider. These include the amount of money collected by Montana and Big Horn County, whether the Tribe would have collected similar amounts but for the state and county taxes, and the cost of the state and county services channeled to tribal members. Evidence was presented on these issues at trial. The parties also presented evidence concerning the economic needs of the Tribe and statistical analysis on the effects of the state taxes on both Westmoreland's production and the ability of the Tribe to market its coal resources.

HISTORY AND ALLOCATION OF THE MONTANA TAXES

25. The Montana Coal Severance Tax is imposed on each ton of coal produced in the state with no exceptions for coal owned by Indian tribes. The tax applied to production occurring after June 30, 1975.

26. During consideration of the coal tax legislation, representatives of the Tribe appeared before the Montana legislature and protested imposition of taxes on Crow coal. The Tribe suggested to the legislature that coal producers receive a credit against state taxes for coal taxes paid to Indian tribes. This proposal was not adopted.

27. A portion of Montana's severance tax payments for coal production between July 1, 1975 and December 1, 1983 was allocated for current expenditures. Among other things, severance tax revenues have been used for

the state's general fund, state equalization aid to public schools, coal-area highway improvements, archeological preservation, various cultural projects, alternative energy research, general funds of the counties where the coal is mined, county land planning, and for a sinking fund servicing renewable resource development bond accounts.

28. A portion of the Montana Coal Severance Tax payments was allocated to three trust funds, whose corpus was unavailable for current expenditure during that period, but whose income and interest were available for expenditure. These were the education trust fund; Fish, Wildlife & Parks – Art Council trust fund; and the coal severance tax trust fund.

29. For the period between July 1, 1975 and December 31, 1982, Westmoreland paid severance taxes to Montana with respect to coal held in trust for the Tribe by the United States in the following amounts (by fiscal year) and with the following allocations to the trust funds identified above (by fiscal year):

Year	Tax Amount	Coal Trust	Educ. Trust	FWP Trust
1976	$ 5,282,763.01	$	$ 528,276.30	$ 66,034.54
1977	5,834,899.75		583,489.98	72,936.25
1978	6,720,489.48	1,680,122.37	504,036.71	63,004.59
1979	6,987,988.94	1,746,997.24	524,099.17	65,512.40
1980	5,778,393.90	2,046,023.88	236,562.19	59,140.69
1981	5,852,067.73	2,926,033.87	585,206.77	146,301.69
1982	7,714,644.08	3,857,322.04	771,464.41	192,866.10
1983	2,639,781.65	1,319,890.83	263,978.17	65,944.54
	$46,811,028.54	$13,576,390.23	$3,997,113.70	$731,790.65

30. The Constitutional trust fund contains Coal Severance Tax monies paid by Montana producers. The principal of the fund may be appropriated only pursuant to a three-fourths vote of the Montana legislature. However, the legislature may appropriate, and had appropriated, the interest and income earned by the fund. As of June 30, 1993, the book value of the Constitutional trust fund was $512,017,571.00.

31. The rate of Montana severance taxes vary depending on factors such as the time the coal was produced, its heating quality, and whether it was extracted through surface or underground mining. During the period between July 1, 1975 and June 30, 1982, the coal mined by Westmoreland was taxed at a rate of 30 percent.

32. Since 1985, the Montana legislature has enacted production incentive credits and incrementally reduced the amount of the severance tax. The current tax rate is 15 percent of the contract sales price. The evidence indicates that the motivation for altering the coal tax structure was to reduce producers' costs and improve Montana's competitive place in the coal production market.

33. The gross proceeds coal tax is imposed on each person engaged in mining coal, with no exceptions for coal mined by Indian tribes. Each person mining coal must file with the State Department of Revenue an annual report that must include, inter alia, a statement of the number of tons of coal extracted, treated, and sold from the mine during the taxable period, and the gross yield or value in dollars and cents derived from the contract sales price. The Department of Revenue transmit the valuation of the gross proceeds of the mine to the

county assessor of each county in which the coal mines are located. The county assessor then enters the value on an assessment roll, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator.

34. As enacted in 1975, the amount of the gross proceeds tax was equal to the number of mills levied for general property tax purposes by the county where the production occurred, multiplied by the contract sales price of the production occurring during the particular fiscal year, i.e., State of Montana, school districts, cemetery districts. The tax rate varied from time to time and from county to county, but added roughly another 5 percent to the coal producer's tax assessments on an annual basis. The gross proceeds tax became effective with respect to production occurring after June 30, 1975. In 1989, the Montana legislature modified the gross proceeds tax rate to 5 percent of the contract sales price for production occurring after June 30, 1989.

35. For the period between July 1, 1975 and December 31, 1987, Westmoreland paid gross proceeds taxes to Big Horn County with respect to coal held in trust for the Tribe by the United States in the following amounts by calendar year:

Year	Tax Amount
1975	$ 124,227.41
1976	787,849.87
1977	919,469.69
1978	1,076,494.88
1979	1,153,727.54
1980	1,205,139.87

1981	863,312.12
1982	1,086,733.89
1983	1,422,458.46
1984	1,026,286.10
1985	871,323.90
1986	892,090.63
Total	$11,429,114.26

EFFECTS OF THE STATE COAL TAXES

36. According to the 1990 census, the unemployment rate for Native Americans on the Crow Indian Reservation was 44 percent, as compared to 6 percent for non-Indians in Montana, and 3.3 percent for non-Indians in Big Horn County. Per capita annual income for Native Americans on the Crow Indian Reservation was $4,243.00, while non-Indians in Big Horn County earned $10,717.00 per year on a per capita basis. From 1979 to 1989, per capita income measured on a constant dollar basis increased by 17 percent for non-Indians in Big Horn County, while real per capita income of Native Americans in Big Horn County fell by 11 percent over the same period. Fifty percent of the Native Americans on the Crow Indian Reservation are living in poverty, as compared to 13 percent of the non-Indians living in Big Horn County. From 1980 to 1990, the percentage of Native Americans in Big Horn County living below the poverty line increased from 32 percent to 53 percent.

37. This Court, in its findings after the 1984 trial, stated:

> (a) There are enormous unmet needs on the Crow Indian Reservation for additional

revenues to fund essential government programs and services for the Crow people in the areas of housing, health, employment, land acquisition, law enforcement, welfare, and education. ***Crow Tribe v. Montana,*** 657 F.Supp. at 584.

(b) Revenues gained from the development of tribally-owned coal reserves, through taxation, royalty collection, or by other legally-sanctioned means, could significantly assist the Tribe in developing a more effective tribal government and a stronger economic base. ***Id.***

38. The Court of Appeals has made the following findings:

(a) It appears that Montana intended, to some extent, to use its coal taxes to profit from the Tribe's coal resources. ***Crow II,*** 819 F.2d at 902.

(b) Montana's coal taxes increased the costs of production by Westmoreland, reducing in turn the royalty that could be paid to the Tribe. ***Id.,*** at 899-900.

(c) Montana's taxes forced coal producers to charge higher prices, reducing the demand for Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe. ***Id.***

(d) By taking revenue that would otherwise go toward supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of coal resources, Montana's coal taxes interfered with the overriding objections of Congress to

encourage tribal self-government and economic development. ***Id.,*** at 902-903.

(e) Montana's coal taxes affected tribal revenues by interfering with the Tribe's coal leasing efforts in that it was difficult for the Tribe to find a lessee. ***Id.,*** at 903.

(f) Montana's coal taxes interfered with tribal economic development and autonomy. ***Id.***

39. At trial, defendants presented additional evidence to that presented at the 1984 trial on the issue of the impact of Montana's coal taxes on Westmoreland's production.

40. Joe Presley, President of Westmoreland Resources, testified that he could not identify any utility contracts lost during the relevant time period due to Montana's coal taxes. He did state that certain customers did exercise the payment option under their contracts rather than continuing to receive coal and that the Montana coal taxes were probably a factor, but not the sole factor, in these decisions. He identified demand, alternative sources, and transportation as other factors.

41. Defendants' economic expert, Stephen Michelson, testified at trial. Michelson conducted a study of the impact of the Montana coal taxes on the sale of Montana coal. He was critical of the NERA report on this issue. The NERA report was presented as evidence at the 1984 trial and cited by the Court of Appeals in *Crow II.* Specifically, Michelson criticized NERA's conclusions that the Montana taxes regulated coal production. Michelson identified no negative impact from the taxes on long-term

contracts for coal, but some effect on spot-market purchases.

42. Mark Berkman, an economist employed by NERA, also testified at trial on the coal tax impact issue. He also testified at the 1984 trial. Berkman defended the NERA report and its methodology. He identified as the one clear constant in explaining the disparity between Wyoming and Montana's coal production growth to be the difference in tax rates. He found Michelson's analysis flawed in failing to establish a cause for the divergent growth paths of Wyoming and Montana coal production.

43. After considering the conflicting expert testimony at trial on this issue, I make no findings in addition to those stated on this issue by the Court of Appeals.

WESTMORELAND AND THE TAXES

44. The Tribe and Westmoreland entered into their original lease as to the Ceded Strip coal production in June of 1972. After Westmoreland executed the 1972 lease, it entered into contracts with four midwest utility companies. These contracts allowed it to pass valid taxes through to the utilities. Westmoreland construed these contractual provisions as precluding payment of tribal taxes unless pursuant to an existing tribal tax ordinance approved by the Department of Interior.

45. The Tribe and Westmoreland renegotiated their lease in November of 1974. The amended lease, which was accompanied by a settlement agreement, provided for increased payments and royalties to the Tribe.

According to Westmoreland's Joe Presley, it was the highest coal production royalty in the nation.

46. At the time of the amended lease in 1974, Westmoreland did not anticipate taxation from the Tribe and considered the increased payment and royalty to be the final benefits paid to the Tribe.

47. After the amended lease was executed, the Tribe adopted its 1976 tax code, imposing a severance tax on coal mining within the boundaries of the Crow Indian Reservation, which were defined as including the Ceded Strip.

48. Westmoreland opposed the Department of Interior's approval of the tax code as applied to the Ceded Strip. It argued the Tribe lacked authority under its constitution to impose a tax outside of the reservation's exterior boundaries and it argued that the tax was inconsistent with the terms of the amended lease and settlement agreement of 1974.

49. The Department of Interior approved the tax code for application within the exterior boundaries of the reservation, but not for the Ceded Strip.

50. Westmoreland, after the enactment of the 1976 tribal tax ordinance, refused to pay the tax. Westmoreland's objection to the tribal tax was motivated by the desire to avoid concurrent taxation by the Tribe and Montana, and its inability to pass on to its utility customers a tribal tax which was not approved by the Department of Interior.

51. In order to resolve the controversy between Westmoreland and the Tribe as to the Tribe's power to tax

coal mining on the Ceded Strip these two parties, in 1982, entered into an amended lease agreement. In the amended lease agreement, Westmoreland agreed to pay the Tribe a tax equal to the Montana taxes existing at that time, less whatever amount was required to be paid in severance and gross proceeds taxes to the state and its political subdivisions. The amended lease further stated:

> . . . Compliance with the terms of this Amendment shall satisfy any obligation which Lessee may have now or at anytime hereafter to pay any severance or other tax to Lessor pursuant to any tax ordinance which now exists or may be adopted by Lessor hereafter, and Lessor shall not attempt to assess or collect any tax or other amount from Lessee except as provided for in the lease as amended.

52. In November of 1982, the Tribe and Westmoreland jointly filed a motion to deposit severance tax payments into this Court's registry, pending resolution of the controversy over the validity of the Montana coal taxes.

53. It appears from the lease language and the record, then, that an agreement between Westmoreland and the Tribe was reached allowing the Tribe to have a tax code in place to claim amounts paid into the Court registry if it were to win its litigation as to the Montana taxes, and to allow Westmoreland to avoid double taxation, whether in the past or in the future.

54. Joe Presley wrote to one of Westmoreland's utility customers a letter dated January 29, 1982, stating that the Tribe's severance tax was not effective on the Ceded Strip and he did not see any possibility of a retroactive

application of the tax. The following testimony reflects the position of Westmoreland's president on these issues:

> Q. (By Mr. Ross) So, Mr. Presley, as late as January 29, 1982, was it your understanding that the Tribe's constitution had never been properly amended to extend taxing jurisdiction to the ceded area?
>
> A. January of '82, you said?
>
> Q. Yes.
>
> A. That was my understanding.
>
> Q. And was it also your understanding as of January, 1982, that the Tribe's tax ordinance had never been approved by the Secretary of the Interior as to apply to the ceded area?
>
> A. As of January, '82?
>
> Q. Correct.
>
> A. Yes.
>
> Q. And under those circumstances, would Westmoreland have paid the Tribe a tax during that 1975 to 1982 time period, in the absence of Secretary approval?
>
> A. No, it would have – there would have to be a valid, existing tax ordinance for us to be able to pass it through to our utility customers.
>
> Q. And is your testimony the same even if the Montana tax did not exist?
>
> A. Yes.
>
> Q. Did the Tribe ever attempt to enforce or collect any taxes from Westmoreland under

its 1976 tax ordinance between the 1975 and 1982 time period?

A. No.

Trial Transcript, pp. 203-204.

Presley went on to testify:

Q. (By Mr. Ross) Was it your understanding when you signed the June, 1982, agreement, that the Tribe did not have at that time a valid tax ordinance as to the ceded area?

A. It was our understanding they did not. However, our attorney was very insistent, as soon as possible after this document was signed, the Tribe would proceed to amend their constitution so we would have a valid, existing tax, which then would allow us to pass the tax on to our utility customers. This amendment provides that we will pay the Tribe a tax, a severance and gross proceeds tax equal to the then state tax, less any tax that we had to pay to the state. So we felt that this agreement protected us from double taxation.

Q. And was it your understanding that the agreement to pay a tax would apply from the date of that agreement forward?

A. We felt that this ordinance gave us a release from any obligation we had in the past, and limited the obligation we would have to the Tribe only to the extent in the future to the severance and gross proceeds tax. The agreement also provided that the Tribe would not levy any other taxes on us or any other assessments other than the severance and gross proceeds tax.

Q. Was it your understanding that under the 1982 agreement, the Tribe released Westmoreland from any tax liability for the 1975 to 1982 time period?

A. Yes.

Trial Transcript, p. 206.

55. The amended lease agreement was approved by the Assistant Secretary of the Interior Department for Indian Affairs. In January of 1983, this Court issued an injunction against the collection of the severance tax and allowed deposit of the tax payments into this Court's registry. It granted the same relief as to the gross proceeds tax in November of 1987.

56. Westmoreland deposited severance tax payments in the amount of $23,404,483.74 into the district court registry pursuant to the Court's order of January 4, 1983, and gross proceeds tax payments in the amount of $536,475.06 into that registry pursuant to the Court's order dated November 25, 1987. These funds, along with accumulated interest, were turned over to the Bureau of Indian Affairs in trust for the Tribe in 1989.

57. The record is clear that Westmoreland did not pay to the Tribe any taxes during the 1975 through 1982 period. Based upon the evidence, I further find that Westmoreland, during this period, would not have paid coal taxes to the Tribe as no Department of Interior approval had been obtained to allow a pass-through to its customers.

58. Westmoreland has not paid any taxes to the Tribe pursuant to the Tribe's 1976 coal tax ordinance.

Pursuant to the September 1982 lease agreement, Westmoreland has paid the Tribe amounts equal to the state severance tax obligations of Westmoreland for the period commencing July 1, 1982 through the present. Pursuant to the September 1982 lease amendment, Westmoreland also has paid the Tribe amounts equal to the state gross proceeds tax for the period commencing with the gross proceeds tax payment due to Big Horn County in November 1987 through the present.

59. The Court of Appeals in ***Crow II***, 819 F.2d at 903, found that the Montana taxes were preempted by federal law. This Court in its Memorandum, Opinion and Order of July 11, 1988, determined that the Interior Department's refusal to approve the Tribe's tax on the Ceded Strip was an error, and that at all relevant times the Tribe had a valid coal mining tax applicable to Westmoreland's mining on the Ceded Strip. The July 11, 1988 ruling, however, was issued not to address an obligation by Westmoreland to pay amounts prior to 1982, but as a basis for ordering that the escrowed funds be released to the Tribe and not Westmoreland by virtue of the 1982 lease agreement.

Regardless of the above-stated rulings and their context, they do not change the fact that Westmoreland would not have paid any amounts under the Tribe's 1976 tax code, and that the Tribe and Westmoreland agreed that Westmoreland would have no tax liability during the 1976 to 1982 period. In addition, the above-cited rulings do not support a conclusion that the presence of the Montana coal taxes caused the Department's error. The evidence indicates that the Department withheld approval because of questions as to the Tribe's authority

to tax on the Ceded Strip and later because the Tribe failed to follow its own constitutional procedures in amending its constitution for purposes of imposing the coal tax, and not because Montana had its tax in place.

60. Westmoreland did not initiate appropriate proceedings under Montana law to recover a refund of the severance and gross proceeds taxes paid to Montana and Big Horn County based on the production of Crow coal.

61. Montana, Big Horn County, and Westmoreland entered into an agreement providing for the settlement and dismissal with prejudice of Westmoreland's cross-claims against Montana and Big Horn County in response to the Tribe's third amended complaint. Under that agreement, Westmoreland waived and/or disclaimed any claim of entitlement to a refund of severance and gross proceeds taxes paid to the state and county between and including the calendar years 1974 and 1987 with respect to Ceded Strip production under its leases with the Tribe. This agreement was executed on September 6, 1991.

COSTS OF STATE AND COUNTY SERVICES AS OFFSETS TO UNJUST ENRICHMENT

62. Evidence was presented at trial concerning the costs of services defendants provided to tribal members during the period of 1975 and 1982. This evidence was presented for consideration as an offset to any unjust enrichment to Montana and Big Horn County from their taxes during this period. These services were categorized as health and social services, natural resources, agriculture and livestock, transportation, commerce and labor, and public safety.

63. This evidence, in the interests of considering the broader relationship between the parties, included the above-identified range of services provided to Crow tribal members living off the reservation, as well as those within the reservation boundaries.

64. The experts retained by defendants to analyze and quantify the cost of services indicated that for the most part the services would have been rendered even in the absence of Westmoreland's Absaloka Mine and were not related to the mine.

65. However, as to the Ceded Strip, this Court has found that the Tribe provided little or no governmental services to the Ceded Strip and has not exercised general civil jurisdiction in the ceded area. Rather, the state and the counties of Big Horn, Treasure, and Yellowstone have always provided public services on the Ceded Strip, many of which facilitated the mining of coal. ***Crow Tribe of Indians v. United States***, 657 F.Supp. 573, 579-582.

INTERFERENCE WITH SHELL

66. The Court of Appeals found that Montana's coal taxes impaired the Tribe's ability to negotiate leases with Shell and other coal companies. ***Crow II***, 819 F.2d at 903. The record also reflects the existence of additional reasons for Shell's failure to mine Crow coal and its cancellation of utility contracts.

67. In June of 1972, the Tribe and Shell entered into a lease agreement as to coal underlying approximately 30,000 acres within the reservation boundaries. It was Shell's intention to develop a facility, known as the

Youngs Creek Mine, on this acreage. In anticipation of the mine's construction, Shell secured contracts from Cajun and HL&P which would be fulfilled from Youngs Creek production. These contracts were signed in 1974 and 1975 and eventually cancelled by mutual agreement in 1981.

68. Prior to the execution of the Cajun and HL&P contracts, Shell was on notice that the Tribe was dissatisfied with the 1972 lease. In July of 1974, the Tribe adopted a resolution declaring that all tribal coal mining leases, whether existing or pending, to be null and void. The Tribe advised Shell that any additional investments by it, in connection with the lease, would be at Shell's own risk and that no subsequent act of the Tribe would be construed as a waiver of the Tribe's right to challenge the validity of the Shell lease.

69. Discussions between Shell and the Tribe were held in 1975 and 1976 over the Tribe's dissatisfaction with the 1972 lease.

70. The Tribe had concerns about Shell's management rights and its own sovereignty relating to control of coal mining operations on the reservation. The Tribe had concerns with the size of the lease and wanted it limited. It also had concerns about Shell providing its members employment opportunities.

71. In 1976, the Tribe filed a lawsuit against Shell, the federal government, and other coal companies. ***Crow Tribe v. Kleppe***, No. CV 76-10-BLG (D.Mont.). In ***Kleppe***, the Tribe sought to invalidate the 1972 lease with Shell.

72. In support of its lawsuit, the Tribe cited the Department of Interior's failure to comply with federal

regulations limiting coal leases to 2,560 acres absent requisite findings, and its failure to comply with the **National Environmental Policy Act** prior to approving the leases.

73. On January 25, 1977, Shell informed Cajun that it could not predict with accuracy when coal deliveries would commence. It recognized Cajun's need to secure alternate coal supplies. Accordingly, Cajun entered into an alternate agreement from another coal supplier for the years 1979 through 1983 on the same schedule as set forth in its contract with Shell.

74. After the commencement of this lawsuit, Shell discontinued active coal development efforts. In May of 1978, this Court entered judgment in favor of the Tribe voiding the Shell and Amax leases' approval for failure to comply with federal regulations.

75. In addition to ***Kleppe,*** Shell official F. K. Blackard, at the 1984 trial, identified other impediments to successful negotiations with the Tribe. There was concern with the Crow Land Use Ordinance in that Shell feared the Tribe would impose constraints Shell could not abide. For periods, there was internal conflicts among tribal factions, which clouded who was the true negotiating agency for the Tribe. Various resolutions were passed by the tribal council restraining the authority of tribal officers and entities from representing and negotiating on behalf of the Tribe.

76. The Tribe also had financial concerns. In light of Montana's coal taxes, many tribal members became dissatisfied with the financial terms of the 1972 Shell lease,

as well as the 1974 Westmoreland lease. The Tribe realized there were more profitable ways to deal with coal companies and it considered the Shell lease outdated. The existence of the Montana coal taxes left less room for the Tribe and Shell to negotiate more favorable financial terms to the Tribe. One response by the Tribe to the Montana taxes was the enactment of its own tax in 1976.

77. Shell discontinued development until 1980, when it and the Tribe executed an agreement as to coal underlying 2,560 acres within the reservation. The 1980 Shell agreement contained a royalty rate of 12 and one-half percent (the federal rate applying to the Powder River Basin) and bonuses. On December 30, 1985, Shell relinquished its rights under the 1980 agreement.

78. Under these circumstances, it was not surprising that Shell had given notice in 1976 to Cajun and HL&P under their contracts, force majeure provisions that it would be unable to supply coal from the Youngs Creek Mine as previously agreed and that those utilities would satisfy their coal demands elsewhere – at least until the mine status could be resolved.

79. The record does not support the assertion that the Montana coal taxes were responsible for the loss of revenue due to the protracted negotiations between Shell and the Tribe. The issues of acreage size, options on additional tracts, tribal control over mining operations, and tribal ordinance restrictions were definite and sharp points of disagreement which clearly delayed successful lease negotiations.

80. Further, it does not appear the defendants took action which had as a conscious objective interference

with the contractual relationship between the Tribe and Shell or that they knew enactment or enforcement of the state taxes would cause Shell to breach its contractual undertaking with the Tribe.

81. The record, then, does not contain persuasive evidence that but for the state's coal taxes, the Youngs Creek facility would have developed to source the Cajun and HL&P contracts. Other factors, such as the delay anticipated by the need to comply with environmental laws, internal turmoil within the Tribe concerning coal development generally, and the Shell lease specifically, which resulted in the 1974 tribal resolution declaring void that lease, and subsequent litigation initiated by the Tribe to set aside the Shell lease, were the causative factors for the Youngs Creek facility not being developed to supply the Cajun and HL&P contracts.

II.

CONCLUSIONS OF LAW

JURISDICTION

1. This Court has jurisdiction of this matter under 28 U.S.C. §§ 1331, 1345, and 1362. Venue is established under 28 U.S.C. § 11391(B).

2. Defendants assert this Court lacks jurisdiction over the Tribe's claim on the basis of a state's immunity from federal court suit under the Eleventh Amendment. This issue was previously determined against the defendants by this Court in its Memorandum, Opinion and Order of December 26, 1990 denying defendants' motion for summary judgment.

RESTITUTION CLAIM BASED UPON COLLECTED TAXES

3. This is a restitution action based upon principles of equity. The Tribe and the United States seek a judgment based upon coal taxes collected by defendants from 1975 through 1982.

4. The specific theories of restitution invoked in this case are *assumpsit* and constructive trust, which both turn on a finding of actionable unjust enrichment. *Assumpsit* relief is quasi-contractual in nature and allows a petitioner to obtain a judgment based upon personal liability, while the constructive trust is generally applied to actions for specific relief. *See* Memorandum, Opinion and Order, December 26, 1990, pages 4-5 (*citing* Restatement of Restitution, § 160, Comment A (1937)).

5. The substantive elements of a claim for restitution, whether based upon *assumpsit* or constructive trust, are a wrongful act, specific property acquired by the wrongdoer traceable to the wrongful act, and a reason, in equity and fairness, why the person holding the property should not be allowed to keep it. Memorandum, Opinion and Order, December 26, 1990, page 15 (*citing* ***Alsco-Harvard Fraud Litigation***, 523 F.Supp. 790, 806-807 (D.C. 1981); ***Schaeffer v. Miller***, 109 P. 973 (1910)).

6. Both *assumpsit* and constructive trust, then, request somewhat different remedies based upon establishing a viable quasi-contract claim for money had and received. *See, generally,* Restatement of Restitution, § 160, Comment A (1937). At the heart of any such action lies a claim of unjust enrichment and liability dictated by the needs of justice and fairness. ***United States v. Nierdorf,***

522 F.2d 916, 918-19 and n. 5 (9th Cir. 1975), *cert. denied* ***Nierdorf v. United States,*** 423 U.S. 1087 (1976).

7. Generally, the principle of unjust enrichment requires that one who has been unjustly enriched at the expense of another must make restitution to the other. One is enriched if he has received a benefit, and unjustly enriched if retention of the benefit would be unjust. Restatement of Law of Restitution, § 1, Comment a. Even when a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt are such that, as between the two persons, it is unjust for him to retain it. ***Id.*** at Comment c.

8. The tribal and federal interests which the Court of Appeals in ***Crow II*** determined preempted Montana's coal taxes give rise to federal jurisdiction in equity to construct a remedy that refers to state law, but is not defeated by it. ***Id.,*** at page 10.

9. This Court has previously determined, then, that this restitution cause of action borrows its elements from state common law. Memorandum, Opinion and Order, December 26, 1990, page 9, relying upon ***City of New Orleans v. United States,*** 371 F.2d 21 (5th Cir. 1967). The substantial question of federal law that carries with it federal jurisdiction is whether the defendants' have been unjustly enriched at the expense of the Tribe through the collection of coal taxes. ***Id.*** at page 9.

10. In determining unjust enrichment, I find it proper, then, to consider all relevant equitable factors bearing on these parties and the circumstances giving rise to this restitution claim.

11. Federal policy favors tribal self-government and economic development. ***Crow I,*** 650 F.2d at 1112-1113. Economic evidence before this Court plainly indicates the Tribe's need for revenues to further these purposes. The Court of Appeals ruled in ***Crow II.*** 819 F.2d at 903, that Montana's coal taxes were preempted by federal law and policies and void for interfering with tribal government. In spite of the fact that Montana's taxes were imposed on Westmoreland, the Tribe's lessee, and not the Tribe, the Court of Appeals found preemption because Montana's coal taxes burdened the Tribe's economic interests by increasing the costs of production by coal producers, which reduced royalties received by the Tribe. ***Id.*** at page 899. Certainly, then, prior court rulings as to the economic burden on the Tribe by Montana's coal taxes is a significant equitable factor favoring the Tribe.

12. Significant also in favoring the Tribe is the ruling in ***Crow I,*** 650 F.2d at 114, that the coal taxed by Montana and Big Horn County, although underlying the Ceded Strip, was a mineral resource of the Tribe.

13. I also note the Tribe's own authority to tax non-Indians who conduct business on the reservation. This is an inherent power necessary to tribal self-government and territorial management. ***Merrion v. Jicarilla Apache Tribe,*** 455 U.S. 130, 141 (1982).

14. I also consider the interests of Montana in deciding the equities of this case. State governments commonly receive both royalty payments and severance taxes from lessees of mineral lands within their borders. Montana has been doing so since 1921. Montana may constitutionally raise general revenue by imposing a severance

tax on coal mined in the state. ***Commonwealth Edison Co. v. Montana***, 453 U.S. 609, 612, 624 (1981).

15. Generally, there is not, nor has there been, an automatic bar to state taxation of matters significantly touching the political and economic interests of Tribes. ***Washington v. Confederated Tribes of the Colville Indian Reservation***, 447 U.S. 134, 157 (1980). A state may validly impose severance taxes on the same reservation production by non-Indians lessees as is subject to the Tribe's own severance tax. ***Cotton Petroleum Corporation v. New Mexico***, 490 U.S. 163, 166 (1989). Notwithstanding federal policy, then, to provide tribes with badly needed revenue, in considering the interests of states, the Supreme Court in ***Cotton*** determined that there has not been congressional intent to remove all barriers to tribal profit maximization. ***Id.*** at 180.

16. There are circumstances, however, which negate a state concurrently imposing a tax on mineral production by non-Indian lessees of a tribe's resources. ***Cotton Petroleum***, 490 U.S. at 166. The preemption of a state's taxes by a tribe's taxes depends upon the particular state, federal, and tribal interests involved. ***Id.*** at 184. Although this was not a scenario where Montana had nothing to do with Westmoreland's mining activities except tax it, preemption was ultimately approved by the Supreme Court because Montana's coal taxes were deemed unusually large and imposed a substantial economic burden on the Tribe. ***Id.*** at 186, n. 17.

17. The factors which dictated preemption in this case, however, do not necessarily implicate a restitution remedy. I have previously determined that it is a question

of fact where the equities lie in this case and, more fundamentally, whether a remedy in restitution arises at all in this case. (Memorandum, Opinion and Order, December 26, 1990, page 18.)

18. In continuing to look at equitable factors, I note that while tribes have an interest in raising revenues for essential government programs, that interest is strongest when revenues are derived from value generated on the reservation by activities involving the tribe and when the taxpayer is the recipient of tribal services. ***Washington v. Confederated Tribes of the Colville Indian Reservation***, 477 U.S. at 157. However, as to the Ceded Strip, this Court has found that the Tribe provided little or no governmental services and has not exercised civil jurisdiction in the ceded area. Public services to residents and businesses on the Ceded Strip, many of which facilitate the mining of coal, have been provided by the state and its subdivisions. ***Crow Tribe v. Montana***, 657 F.Supp. 573, 579-582.

19. I do not lose sight of the fact that, notwithstanding its severity, the Montana coal severance tax was found by the Supreme Court in 1981 to be lawful and not offensive to the Commerce Clause nor the Supremacy Clause. ***Commonwealth Edison Co. v. Montana***, 453 U.S. at 609. The Court found the tax met the four-part Commerce Clause test under ***Complete Auto-Transit, Inc. v. Brady***, 430 U.S. 274, 279 (1977), in that: (1) it applied to an activity with a substantial nexus with the taxing state; (2) it was fairly apportioned; (3) it did not discriminate against interstate commerce; and (4) it was fairly related to services provided by the state. ***Id.***

20. States have considerable latitude in imposing general revenue taxes. ***Id.*** at 622. There is no Due Process Clause requirement that the amount of general revenue taxes collected on a specific activity be reasonably related to the value of services provided to the activity. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would abandon the fundamental principle of government that it exist primarily to provide for the common good. ***Id.*** at 622-623, relying upon ***Carmichael v. Southern Coal and Coke Company***, 301 U.S. 495, 521-523 (1937). In that regard, the record most certainly reflects that the Tribe and its members have been beneficiaries of state services and the societal organization protection and common good that they promote.

21. The Court of Appeals in ***Crow II*** was not deterred by the constitutional analysis of ***Commonwealth Edison*** in determining that Montana's coal taxes are preempted. In determining the appropriateness of an award to the Tribe in restitution, I see the principles of ***Commonwealth Edison*** as relevant, although not determinative.

22. In light of the above-stated authority, I find that the authority of the Tribe to impose taxes on Westmoreland to the exclusion of defendants was a properly contested issue and not legally determined until after the 1975 to 1982 period.

23. In analyzing the damages issues separate and apart from a preemption analysis, it is reasonable that there is no entitlement to restitution without the presence

of the predicates for common law recovery in quasi-contract.

24. In that light, this is not a typical or an arguably proper unjust enrichment case. Restitution contemplates a relationship between the parties wherein a plaintiff is required to show: (1) a benefit conferred on defendant by the plaintiff; (2) acceptance of the benefit by the defendant; and (3) circumstances which make it inequitable for defendant to retain the benefits. ***FDIC v. British-American Corporation,*** 755 F.Supp. 1314, 1324 (E.D. North Carolina 1991); ***Schaeffer v. Miller,*** 109 P. 970 (1910). Clearly, defendants have not received benefits from the Tribe nor has the Tribe given benefits to defendants. The funds paid to Montana and Big Horn County belong to Westmoreland and not the Tribe. This lack of privity did not bar preemption of defendants' taxes by the Court of Appeals. Again, however, I find it has its place in determining restitution damages.

25. In addition to determining that recovery in this action turns upon a finding of unjust enrichment, ***id.***, at 15 (*citing* ***Midcoast Aviation, Inc. v. General Electric Credit Corporation,*** 907 F.2d 732, 743 (7th Cir. 1990)), I have relied upon ***Valley County v. Thomas,*** 97 P.2d 345 (Mont. 1939), for the principle that a county could recover in restitution against another county, even when privity is lacking.

While restitution recovery here need not turn on privity, I do not find that ***Valley County*** supports a broad principle removing privity between a plaintiff and defendant as a restitution consideration. In ***Valley County,*** the

required privity was supplied by the Montana state statute binding upon both counties, which required license fees to be paid to that county in which the automobile's owner was domiciled, i.e., both counties claimed and could receive the fees only pursuant to the same statute. No contention has been, or can be, made here that the Tribe was an intended beneficiary of the obligations imposed on Westmoreland by the Montana coal taxes.

26. In finding preemption, the Court of Appeals in *Crow II* found that defendants' taxes had a negative financial impact on tribal resource development activities. 819 F.2d at 899-900. This preemption finding may appear on its face to dictate a quasi-contract finding that defendants were, therefore, unjustly enriched at the Tribe's expense during the 1975-1982 period. For purposes of this analysis, however, I find it proper to consider additional factors bearing on defendants' receipt of the tax money and what was occurring between the parties to determine if it is unjust for defendants to retain the benefits. Restatement of Law of Restitution, § 1 at Comment c.

27. In considering the relationship between the parties, I find that defendants received Westmoreland's tax payments under color of state law. During the 1976 to 1982 period, Westmoreland paid a tax to defendants, which obligation was independent from any obligations to the Tribe. As stated above, there is no automatic bar to more than one sovereign to concurrently taxing the same activity. ***Cotton Petroleum***, 490 U.S. 188-189. Westmoreland did not initiate available proceedings to recover taxes paid to defendants. M.C.A. § 15-1-402-406. In so

finding, I do not criticize or second guess Westmoreland's strategy in response to the potential of double taxation.

28. At the same time, it does not follow that defendants, who received taxes from Westmoreland under what was then an existing lawful obligation, now owe restitution damages to the Tribe in light of the failure of Westmoreland to initiate appropriate proceedings to recover funds. The opposite result would now allow the Tribe and the United States to recover taxes which the actual taxpayer admittedly cannot. The Tribe could have redressed Westmoreland's omission by proceeding against Westmoreland or it could have contracted with Westmoreland to initiate such appropriate action to recover the Montana taxes.

29. Equitable relief will not be granted if the requesting party possessed adequate legal remedies to address the alleged wrong, e.g., ***Meyer v. Lemley***, 86 Mont. 83, 92, 282 P. 268, 271 (1929); ***Knighton v. Texaco Producing, Inc.***, 762 F.Supp. 686, 693 (W.D. Louisiana 1991). The Tribe possessed adequate legal remedies.

30. Even if the appropriate quasi-contract relationship between the parties could be implied, the evidence does not show that but for defendants' imposition of its taxes, the Tribe would have collected from Westmoreland or Westmoreland would have paid to the Tribe coal taxes from 1975 to 1982. Rather, it reflects the Tribe would not have collected coal taxes regardless of the existence of defendants' coal taxes. The Tribe was not in a position to impose its coal tax on Westmoreland during this period. This disability was not due to the presence of Montana's taxes. Congress set up a series of federal checkpoints that

must be cleared before a tribal tax can take effect. Under the **Indian Reorganization Act,** 25 U.S.C. § 476-477, a tribe must obtain approval from the Secretary of the Interior before it adopts or revises its constitution to announce its intent to tax non-members. Further, before the ordinance imposing the severance tax can take effect, the Tribe was required to obtain approval from the Secretary. These congressional hurdles were not cleared by the Tribe as to taxing Ceded Strip coal during the relevant period. My factual findings show no evidence that the Tribe's failure to do so was caused by Montana's taxes. I find this very significant and relevant to an unjust enrichment determination.

31. It is clear that defendants were enriched by their taxes on Westmoreland's coal mining activities on the Ceded Strip. It is only the enrichment which is unjust, however, that supports a restitution award. ***Robertus v. Candee,*** 670 P.2d 540, 543 (Mont. 1983). Further, the task here is to not necessarily remove all benefit to a defendant, but to remove the enrichment which plaintiff can establish as unjust. ***Midcoast Aviation,*** 907 F.2d at 745. I am not convinced that defendants' enrichment has been unjust or that restitution is in order.

32. Legal precedent addressing the equity of restitution in like situations is scant, but noteworthy. In ***Ute Tribe v. State Tax Comm'n. et al.,*** 574 F.2d 1007 (10th Cir. 1978), *cert. denied* 439 U.S. 965 (1978), the tribe sought relief from Utah taxes on the sale of personal property made by tribal enterprise made within the reservation. The Circuit held that while the Utah tax was applicable to sales on trust lands to non-Indians, sales not on trust

lands were not within state taxing power. Without citation to authority concerning the construction of equitable remedies, the court stated:

> Insofar as this action seeks to have the state of Utah return sales taxes collected by the tribe under a generalized or lump-sum claim, it must fail as these funds now in the hands of the state were paid by the buyers of the goods and not the sellers. If anyone can seek a recovery, or refund, it is these buyers.

The ***Ute*** decision clearly comports with above-cited restitutionary principles.

33. In ***Crow I,*** the Court of Appeals stated, in a footnote, that "as to the taxes already paid by Westmoreland, however, it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid." 650 F.2d at 1113, n. 13.

34. Although not deterred by this language of ***Crow I*** in denying summary judgment to defendants (*see* Memorandum, Opinion and Order, December 26, 1990, page 12), upon further consideration I revisit that issue. First, the rationale in the 1990 opinion was based upon this Court's earlier opinion which concluded that the Tribe had a valid tax in place at all relevant times. (Opinion and Order, September 11, 1988). However, the Court, in the 1988 opinion, was not in any manner addressing a right to restitution based upon taxes collected during 1976 to 1982. It was, rather, addressing whether the approximately $28,000,000.00 paid into the Court's registry by Westmoreland since 1983 should be released to the

Tribe and not Westmoreland by virtue of the 1982 lease agreement between these two parties.

35. I find that in weighing the principles of restitution and the equities, restitution damages based upon the Montana coal taxes collected between 1975 and 1982 are not warranted and should not be granted.

INTERFERENCE WITH SHELL CONTRACT CLAIM

36. In the final pretrial order, the Tribe and the United States also claimed restitution damages on the grounds that defendants were unjustly enriched as a result of their tortious interference with the Tribe's contractual and business relationships with the Shell Oil Company.

37. This claim in restitution is one of tortious acquisition of a benefit. It is alleged that defendants, via their taxing activities on reservation coal, interfered with coal mining lease agreements between Shell and the Tribe. It is also alleged that defendants' activities caused the cancellation of the contracts between Shell and two utilities, Cajun and HL&P.

38. The substantive elements of this claim are drawn from the intentional tort of interference with contractual and business relations. To establish a *prima facie* case of interference with contractual or business relations, it must be shown that the acts: (1) were intentional and willful; (2) were calculated to cause damage to the plaintiff in his or her business; (3) were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and (4) that

actual damages and loss resulted. ***Bolz v. Myers,*** 651 P.2d 606, 611 (Mont. 1982).

Interference can give rise to tort liability only if one intentionally intermeddles with another's contractual or business relations to which one is a stranger. Restatement 2d of Torts, § 766A (1979).

Restatement 2d of Torts, § 767 (1979) sets out factors to be considered in determining whether intentional interference with contractual rights is improper. Those factors are: (a) the nature of the actor's conduct; (b) the actor's motives; (c) the interests of the other with which the actor's conduct interferes; (d) the interest sought to be advanced by the actor; (e) the social interest in protecting the freedom of action of the actor and the contractual interest of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties.

39. It is clear that the motivating interests for the actions by all the parties are economic. Each entity during this period sought to lawfully profit from resources in which it had an obvious and reasonable interest.

40. In considering the intentional interference claim as it pertained to the then existing coal lease agreement between the Tribe and Shell, my Findings of Fact negate the claim that defendants tortiously interfered with this contract. The state taxes certainly did not cause Shell to breach its coal lease agreement. Rather, the Tribe, on grounds not related to Montana's taxes, sought to invalidate that lease and its efforts led to this Court's action doing so in 1978.

41. I must also consider the alleged interference as it relates to the prospective contractual relations between Shell and the Tribe, that is, their renegotiation process after the 1978 cancellation of the lease.

42. As to both the existing and the prospective contracts, the record is devoid of evidence that defendants' coal taxes were calculated to cause damages to the Tribe and specifically to cause it and Shell to not conduct coal mining business together. There was also no evidence that defendants knew this consequence would result from its taxes.

43. The fact that Montana's coal taxes were later preempted and declared invalid does not mean that between 1976 and 1982 they were levied with an unlawful purpose. The record does not support that conclusion either.

44. The presence of the numerous factors (set forth in the Findings of Fact) which were points of disagreement and which delayed successful negotiations between the Tribe and Shell, and which were not related to defendants' taxes, do not support a cause and effect relationship between Montana's coal taxes and the Tribe's alleged damages. I do not find that the damages and losses claimed by the Tribe due to the loss of Shell's business resulted from the actions of defendants.

45. For these reasons, I do not find that the Tribe and the United States have proved facts which support restitutionary damages to them on the basis of this tortious interference claim. They should not be awarded such damages.

46. For the foregoing reasons, I conclude that the Tribe and the United States are not entitled to damages.

Based on the foregoing Findings of Fact and Conclusions of Law,

JUDGMENT IS HEREBY ENTERED IN FAVOR OF DEFENDANTS.

The Clerk of Court shall forthwith notify the parties of the entry of judgment herein.

DONE and **DATED** this 23rd, day of November, 1994.

/s/ Jack D. Shanstrom
United States
District Judge

The CROW TRIBE OF INDIANS, Plaintiff-Appellee,

v.

STATE OF MONTANA; Denis Adams, Director, Montana Department of Revenue; Big Horn County, Montana; Lorraine Hamilton, Treasurer, Big Horn County, Montana, Defendants-Appellants,

and

Westmoreland Resources, Inc. Defendant-Intervenor,

v.

UNITED STATES of America, Plaintiff-Intervenor-Appellee.

No. 91-35682.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted July 9, 1992.
Decided July 23, 1992.

Clay R. Smith, Sol., State of Mont., Helena, Mont., John W. Ross, Sp. Asst. Atty. Gen., Billings, Mont., Christine A. Cooke, Big Horn County Atty., Hardin, Mont., for defendants-appellants.

Robert S. Pelcyger, Fredericks, Pelcyger & Hester, Boulder, Colo., for plaintiff-appellee.

Edward J. Shawaker and Elizabeth Ann Peterson, U.S. Dept. of Justice, Washington, D.C., for plaintiff-intervenor-appellee.

Appeal from the United States District Court for the District of Montana.

Before: ALARCON, RYMER, and T.G. NELSON, Circuit Judges.

ORDER

The district court certified for interlocutory appeal its denial of appellant's Motion to Dismiss for failure to state a claim on which relief can be granted. This court granted permission for the appeal on July 17, 1991.

The sole issue on this appeal is whether the Crow Tribe and the United States, as its trustee, can state a claim for relief in claiming assumpsit, for money had and received, and constructive trust in its Fourth Amended Complaint. Montana contends there must be, if not privity, then a duty inter sese between the interests of the Crow Tribe and the money collected from a third person by Montana's void tax. This contention was already addressed by this court in Crow Tribe of Indians v. State of Montana, 819 F.2d 895 (9th Cir.1987) (Crow II), aff'd, 484 U.S. 997, 108 S.Ct. 685, 98 L.Ed.2d 638 (1988), when we said:

> Montana argues that its taxes do not burden Crow's economic interests because the Tribe itself does not pay the tax. In other words, the taxes were imposed on the lessee, Westmoreland, and the Tribe had no duty to reimburse. So, says Montana, the Tribe's economic interests were not affected.
>
> We have already rejected this argument. Crow I, 650 F.2d at 1113 n. 13. The state taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal

> producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

819 F.2d at 899.

We went on to say in Crow II:

> Montana taxes mineral resources that are "a component of the reservation land itself." Crow I, 650 F.2d at 1117. The tax revenue from coal production could generate funds for tribal services and provide employment for tribal members. Mescalero, 462 U.S. at 341, 103 S.Ct. at 2390. By taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development.

819 F.2d at 902-903.

Permission to appeal was improvidently granted. Appeal DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS,	)	Cause No. CV 78-110-BLG-JDS
Plaintiff,	)	
vs.	)	**OPINION AND ORDER OF CERTIFICATION FOR INTERLOCUTORY APPEAL**
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	
vs.	)	**********
STATE OF MONTANA, et al.,	)	(Filed May 29, 1991)
Defendants,	)	
WESTMORELAND RESOURCES, INC.,	)	
Defendant-Intervenor.	)	

Two motions remain unresolved in this matter and both bear greatly on further proceedings. First, the Crow Tribe, with the support of the United States, seeks an amendment of my December 26, 1990 Opinion and Order. Second, the State of Montana and the County of Big Horn move for certification of the same Opinion and Order pursuant to **28 U.S.C. § 1292(b)**. Specifically, the defendants seek to appeal my decision that plaintiffs have stated a claim upon which relief can be granted.

DISCUSSION

I. DEFENDANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Both parties acknowledge that the December 26, 1990 Opinion and Order triggers an enormous amount of discovery, research and equitable fact finding. Defendants argue, and I concede, that this case involves novel issues of fact and law which, if overturned, would result in substantial cost to both parties and the judiciary. Plaintiffs respond that this case does not meet the "exceptional circumstances" test embodied in **Section 1292(b).**

The legal and factual issues in this case are highly unusual and my decision to deny defendants' motion for summary judgment meets the appropriate criteria for certification for interlocutory appeal. **Section 1292(b)** provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the court of appeals or a judge thereof shall so order.

Under this section, three parts are necessary: a controlling question of law, a substantial ground for difference opinion on the issue of whether plaintiffs have stated a claim, and the appeal must materially advance the termination of this litigation. ***In re Cement Antitrust Litigation,*** 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom* ***Arizona v. Ashgrove Cement Co.,*** 459 U.S. 1190 (1983). My decision rejecting defendants' motion for summary judgment certainly controls the remainder of this lawsuit. Immediate appellate review serves this Court's interest in maintaining judicial efficiency. A reversal at this stage could eliminate the extensive process of equitable fact finding and, on the other hand, an appellate affirmance might give further direction to these proceedings. The fact that defendants wish to appeal a motion for summary judgment does not impede this motion for interlocutory appeal. ***Virgil v. Time, Inc.,*** 527 F.2d 1122 (9th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976). Defendants seek this appeal at a suitably early point in the case to avoid losing substantial headway in the development of a factual record. Simply put, this case remains a long way from final adjudication.

Since this case involves novel questions of law with little in the way of direct precedent, there are substantial grounds for disagreement as to whether plaintiffs have stated a claim. To meet the threshold requirements of **Section 1292(b),** defendants point to their underlying argument which I chose not to adopt in my December Opinion; the incidence of tax falls on Westmoreland Resources, Inc., not on the Tribe. Both ***Ute Indian Tribe v. State Tax Commission,*** 574 F.2d 1007, 1009 (10th Cir. 1976), *cert. denied,* 439 U.S. 965 (1978), and Footnote 13 of

Crow Tribe v. Montana, 650 F.2d 1104 (9th Cir. 1981), *amended* 665 F.2d 1390, *cert. denied,* 459 U.S. 916 (1982) (***Crow I***), indicate that without losing money of its own, the Crow Tribe has no standing to pursue a refund from the State of Montana. I am not convinced that these cases bar this action, but I am concerned that the preemptive powers of the **Mineral Leasing Act of 1938, 25 U.S.C. 396(a)-(g)** (1982), and the Crow Tribe's tax code do not retroactively invoke this Court's broad powers in equity. There also exists a substantial question as to whether case law allowing equitable remedies for the recoupment of taxes between counties should extend by analogy to this action. This case involves substantial sums of money and the collection of any damages presumably would require an act of the Montana legislature. For these reasons, the final determination of defendants' challenge to this action must not be taken lightly.

Finally, I find that prompt appellate resolution of defendants' motion for summary judgment for failure to state a claim will materially advance the ultimate resolution of this case. It would be naive to presume that an appeal might not come from these proceedings. All parties are deeply entrenched and they simply have too much at stake to accept a decision at the district level. On the other hand, a determinative ruling from the appellate court at this point may well dissolve this case or move it more positively to an out-of-court settlement.

Despite the fact that plaintiffs filed this case in 1978, this branch of the litigation is still in its early stages. Nothing in plaintiffs' arguments convinces me that this is not a unique case suitable for interlocutory appellate review pursue [sic] to **28 U.S.C. § 1292(b).** Therefore,

pursuant to defendants' motion, and upon a showing of good cause, I hereby certify an interlocutory appeal of defendants' motion for summary judgment for failure to state a claim upon which relief can be granted. To facilitate the purposes of an interlocutory appeal, I urge the appellate court to adopt an abbreviated briefing and hearing schedule so as not to leave stale much of the discovery that has proceeded in the past month. In addition, all further proceedings in this case are stayed pending either the circuit court's denial of an interlocutory appeal or a decision on the merits.

II. PLAINTIFFS' MOTION TO AMEND THE DECEMBER 26, 1990 OPINION AND ORDER

Plaintiffs take issue with two portions of my December 26, 1990 Opinion. First, language near the end of the Opinion states that plaintiffs' award, *if any,* depends upon the equities of the case. Plaintiffs argue that this is a misstatement of the law and must be stricken. Second, plaintiffs urge me to reassess my statement regarding an award of prejudgment interest. The final portion of the Opinion states that an award of prejudgment interest must also await a full disclosure of the equities of this case.

Neither of these statements could be considered a holding in the case. There were offered merely to provide further direction for discovery and the presentation of this case. The core of the Opinion denied defendants' motion for summary judgment. The scope of this Court's power to grant equitable relief will be more fully defined in later stages of this case and in appellate review. None

of the language objected to in my December 26, 1990 Opinion affects the substantial rights of the parties at this time. Therefore, I am not inclined to reassess language in the December 26, 1990 Opinion at this time. *See* **Fed.R.Civ.P. 61.**

Based on the foregoing,

IT IS ORDERED:

1. The December 26, 1990 Opinion and Order is certified for interlocutory appeal pursuant to **28 U.S.. [sic] § 1292(b)** as it relates to defendants' motion for summary judgment for failure to state a claim upon which relief can be granted.

2. All further proceedings shall be stayed pending a decision by the appellate court.

3. Plaintiffs' motion to amend the December 26, 1990 Opinion and Order is denied.

The Clerk of Court is directed to forthwith notify the parties of the making of this order and to process the interlocutory appeal.

DONE and **DATED** this 29th day of May, 1991.

/s/ Jack D. Shanstrom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, **THE UNITED STATES OF AMERICA,** Plaintiff-Intervenor, vs. **STATE OF MONTANA; DENIS ADAMS,** Director, Montana Department of Revenue; **BIG HORN COUNTY, MONTANA; LORRAINE HAMILTON,** Treasurer, Big Horn County, Montana, Defendants, **WESTMORELAND RESOURCES, INC.,** Defendant-Intervenor.	Cause No. CV 78-110-BLG-JDS **MEMORANDUM OPINION AND ORDER** ********** (Filed Dec. 26, 1990)

Defendant State of Montana has moved the Court for summary judgment on issues of law concerning plaintiff's claim for monetary relief in equity. The primary hurdles raised before plaintiff's claims are: (1) lack of jurisdiction to proceed in federal court; (2) failure to state a viable claim for equitable relief; and/or (3) lack of standing to pursue an action against defendant. The issues in this case spring from poorly defined principles

of equity and, for the reasons expressed in the body of this opinion, they are not suitable for summary judgment at this time.

I.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Facts

Although the background facts in this case have been thoroughly developed in earlier orders and opinions by both this Court and the Ninth Circuit Court of Appeals, they require some limited review for the purposes of this motion. In its historical context, this motion for summary judgment is a branch of the longstanding dispute between the Crow Tribe and the State of Montana over the application of a state severance tax to tribally-owned coal. The dispute arises on an area of land known as the "ceded strip," which includes some 1,137,500 acres of split estate land. Under a 1904 agreement with the United States, the Crow Tribe ceded this area to the United States for sale to homesteaders. The land was opened for sale to non-Indians in 1909, but only the surface rights were transferred in the sales. ***Cady v. Morton,*** 527 F.2d 786, 789 (9th Cir. 1975). Thus, the Crow Tribe has always retained an ownership interest in the mineral rights beneath this strip of land.

In 1972, the Crow Tribe leased two tracts of coal underlying the "ceded strip" to Westmoreland Resources, a non-Indian mining company. In 1975, the State of Montana enacted severance and gross proceeds taxes which, in some cases, exacted nearly 30% of the value of coal

mined within Montana. *See* **Mont. Code Ann. § 15-35-101-111** (1979); **Mont Code Ann. § 15-23-701-704** (1979). The State of Montana imposed this tax on coal removed from the "ceded strip" under lease with the Crow Tribe. The Tribe enacted its own severance and gross proceeds taxes in 1976 in **Resolution No. 76-21A** of the **Crow Tribal Taxation Code**. This tax was approved by the Department of the Interior as it applied to the Reservation, but the approval did not extend to the "ceded strip" because there was some doubt in the Department as to whether the Tribe's tax jurisdiction extended to the split estate lands. In July of 1978, the Crow Tribe brought this action to enjoin state taxation on the "ceded strip" and, thus, to allow the collection of its own tax.

Westmoreland paid the state severance taxes until 1983, when this Court enjoined the payments. However, through 1982, Westmoreland paid no taxes to the Tribe because the legal validity of the tax, as it applied to the "ceded strip," was in question. Any confusion regarding the legitimacy of the state tax was clarified in the September 11, 1988 Order stating, "The approval of the Department of the Interior of the 1976 Crow Tribal Tax Code as it applied to activities on the Reservation was necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow Tribal Coal." Order of September 11, 1988, at page 7, CV 78-110-BLG-JFB. The tribal tax in effect between 1976 and 1982 was a 25% tax on the f.o.b mine value of all coal mined on the Reservation. After 1982, this Court ordered the state's coal taxes paid in escrow pending judicial determinations of the validity of

the tax and of the proper ownership and control of the tax revenues.

The central issue in this motion is whether the Tribe may invoke equitable remedies to recover taxes paid by a private coal company to the State of Montana under an invalid state law. Montana's coal severance tax did not survive the legal challenge brought by the Tribe in ***Crow Tribe of Indians v. State of Montana,*** 650 F.2d 1104 (9th Cir. 1981), *cert. denied* 459 U.S. 916 (1982), and ***Crow Tribe,*** 819 F.2d 895 (9th Cir. 1987), *aff'd* 484 U.S. 997 (1988) (hereafter ***Crow I*** and ***Crow II,*** respectively). In ***Crow II,*** the Ninth Circuit Court of Appeals held that Montana's coal tax cannot apply to coal mined on the Reservation because it is preempted by the federal **Mineral Leasing Act** of 1938, **25 U.S.C. §396(a)-(g)** (1982), and because it invades the Tribe's inherent power of self government. ***Crow II*** at 903. Therefore, at all times after 1976, the Crow coal tax, by its very existence, superseded the Montana severance and the Big Horn County gross proceeds taxes on the "ceded strip" coal.

This holding has left two periods in which Westmoreland paid coal taxes to the wrong party: first, between 1975 and 1982, Westmoreland paid taxes to the State of Montana in a sum of approximately $53,000,000.00, and second, between 1975 and 1988, Westmoreland paid about $11,000,000.00 in gross proceeds tax to Big Horn County.

Discussion

Generally, this is an action in equity to prevent unjust enrichment by the State of Montana at the expense of the

Crow Tribe. *See* **Rest. of Restitution § 1** (1936). The specific theories of restitution invoked in this case are *assumpsit* and constructive trust, which both turn on a finding of actionable unjust enrichment. *Assumpsit* relief is quasi-contractual in nature and allows a petitioner to obtain a judgment based upon personal liability, while the constructive trust is generally applied to actions for specific relief. **Rest. of Restitution, § 160 comm. (a)** (1936).

Based on principles of equity, the Tribe and the United States in trust for the Tribe seek a judgment against defendants for taxes wrongfully collected by the State in violation of the Tribe's sovereign tax jurisdiction. As a general principle, the goal of equitable relief is to restore the plaintiff to the fullest extent possible for the unjust enrichment of another. ***Pangilinan v. INS,*** 796 F.2d 1091 (9th Cir. 1986), *rev'd on other grounds by* 486 U.S. 875 (1988) (the court cannot fashion an equitable remedy in violation of statutory law). These remedies are said to be "a special blend of what is necessary, what is fair, and what is workable." ***Lemon v. Kurtzman,*** 411 U.S. 192, 200-01 (1973).

Defendants bring this matter before the Court as a motion for summary judgment. The Court reviews this motion for genuine issues of material fact pursuant to **Fed.R.Civ.P. 56(c).** Therefore, the non-moving party must establish genuine issues of fact that exist with regard to the essential elements of this action in equity. *See* ***Celotex Corporation v. Catrett,*** 477 U.S. 317, 323 (1985). By its very nature, this motion incorporates those preliminary questions of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Plaintiffs portray the case as very simple. In an action for restitution (applying the principles of equity to avoid an unjust enrichment), plaintiffs need only establish jurisdiction to avoid summary judgment because actions in equity invariably involve genuine issues of material fact. Defendants argue that: (1) a suit by the Tribe against the State in federal court is prohibited by the Eleventh Amendment; (2) there is no federal question jurisdiction because the Tribe is attempting to apply state law; and (3) that plaintiffs cannot establish the essential elements of a claim for relief using theories of restitution because it was Westmoreland that paid the taxes, and it is Westmoreland that must recover them. The Court addresses these arguments in succession in its search for genuine issues of material fact that can prevent summary judgment.

A. The Eleventh Amendment Bar

Originally, the State of Montana argued that the Eleventh Amendment prohibits a suit against the State by the Crow Tribe in federal court. The basis of this argument was that the "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." ***Dellmuth v. Muth,*** ___ U.S. ___, 109 S.Ct. 2397, 2400, 105 L.Ed.2d 181 (1989). Based on this holding, defendant Montana argues that neither **28 U.S.C. §§ 1331** nor **1362** contain such unmistakably clear waiver language.

As acknowledged by defendants, a recent Ninth Circuit Court of Appeals case, ***Native Village of Noatak v. Hoffman,*** 896 F.2d 1157 (9th Cir. 1990), does include

unmistakably clear language regarding this issue. The court stated:

> To recapitulate, there is no need for an explicit overriding of state immunity if the state in consenting to the Constitution has consented to be sued. The states did give consent to federal jurisdiction of Indian affairs.

Id. at 1172. In addition, the United States, as a plaintiff, can sue on behalf of the tribes and, when it does so, there are no longer Eleventh Amendment immunity questions that bar the parallel claims of a tribe. ***Arizona v. California,*** 460 U.S. 605, 614 (1983).

B. Federal Subject Matter Jurisdiction

Plaintiffs allege subject matter jurisdiction arising under **28 U.S.C. § 1331** (a federal question arising under the Constitution, treaties and statutes of the United States), **28 U.S.C. § 1362** (federal jurisdiction of civil matters brought by tribes arising under the Constitution, laws and treaties of the United States), and **28 U.S.C. § 1345** (federal jurisdiction over civil actions commenced by the United States or by any agency authorized to sue by Congress).

Plaintiffs have countered Montana's jurisdictional arguments at every turn. First, Montana argues that the constructive trust and *assumpsit* claims involve money paid by a third party, Westmoreland, that could not bring these claims under **28 U.S.C. 1341**. ***See California v. Grace Brethren Church,*** 457 U.S. 393, 408, 409 (1982). Therefore, since the effect of a judgment in this case would be to discharge Westmoreland's entitlement to a

refund of taxes, this action would be void for undermining **Section 1341**. ***Id.*** at 408-9. The ***Grace*** holding, however does not control the unique jurisdictional issue presented when a quasi-sovereign tribe seeks to enjoin state taxation on tribal lands.

The **Tax Injunction Act, 28 U.S.C. § 1341**, prevents the federal courts from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law where a plain, efficient, speedy remedy is available under state law. However, pursuant to **28 U.S.C. 1362**, the federal courts have jurisdiction over matters brought by Indian tribes arising under the Constitution, treaties or laws of the United States notwithstanding the provisions of **Section 1341** where, as here, the United States could sue on behalf of the tribe. ***Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,*** 425 U.S. 463 (1976) (regarding the tribe's action for an injunction preventing the application of a state cigarette sales tax). Therefore, the negative implications of this action on the **Tax Injunction Act** do not operate to bar jurisdiction in this limited factual circumstance.

Second, Montana argues that the cause of action in this case, restitution, is a state common law cause of action that does not involve a federal question. In order for a federal court to assume jurisdiction of a state cause of action, there must be a substantial question of federal law that is attached as an element. ***Franchise Board Const. Laborers Vacation Trust,*** 463 U.S. 1, 13 (1983); ***Merrel Dow Pharmaceutical v. Thompson,*** 478 U.S. 804 (1986). Based on these holdings, Montana argues that the Tribe has raised only state law claims that are not appropriate for establishing federal jurisdiction.

Federal jurisdiction in this matter, however, is valid for two reasons. First, it has already been established. This case is an extension of the equity jurisdiction originally invoked when this Court granted an injunction in January of 1983 preventing further direct tax payments to the State of Montana.

Second, the restitution cause of action is a federal claim that borrows its elements from state common law. ***City of New Orleans v. United States,*** 371 F.2d 21 (5th Cir. 1967), *cert. denied* 387 U.S. 949 (1967). The substantial question of federal law that carries with it federal question jurisdiction is whether the State of Montana has been unjustly enriched at the expense of the Crow Tribe through the collection of coal severance and gross proceeds taxes. It follows from ***Crow II*** and this Court's previous orders that if the State never had a valid coal tax in effect, and if the State collected taxes that would otherwise have fallen to the Tribe, then there are significant questions in equity whether the state unjustly profited at the expense of the Tribe's sovereign treaty rights and in derogation of the purposes of the **Mineral Leasing Act** of 1938. *See* ***Crow II,*** 819 F.2d 895, 898, 902 (9th Cir. 1987), *aff'd* 484 U.S. 997 (1988); Order of Sept. 11, 1988, United States District Court of Montana, CV 78-110-BLG-JFB.

The same tribal and federal interests that preempted Montana's coal tax give rise to federal jurisdiction in equity to construct a remedy that refers to state law, but is not defeated by it. In *Board of County Comm'ners of Jackson County v. United States,* 308 U.S. 343 (1939), another Indian tax law case dealing with an action to recover interest in equity, the United States Supreme Court stated:

> This litigation is not between the United States and a private litigant, but between the United States and the political subdivision of a state. . . . Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations. [citations omitted]. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. [citation omitted]. Nor may the right to recover taxes illegally collected from Indians be unduly circumscribed by state law.

Id. at 350-51. The Court went on to hold that the recovery of interest was a question of simple equity that reflects the Congressional policy toward tribal economic independence and limited sovereignty. *Id.* at 352.

Having established a violation of significant tribal interests based upon treaty and federal law, this Court has broad equitable powers to construct a remedy patterned after a state common law remedy. In ***City of New Orleans,*** *supra,* the court considered a tax levied by New Orleans on equipment that, as it turned out, belonged to the federal government. The third party, Chrysler, paid state taxes on the equipment and was reimbursed by the federal government. Therefore the government was acting to collect money paid. But when the court was faced with arguments that the government had no standing because Chrysler actually paid the taxes, the court stated:

> Against the inequities of such a procedural trap, we think there is ample power in the United States District Court to protect the sovereign

> against such unjust enrichment on familiar principles of money had and received. [citations omitted]. This harmonizes the usual principle that Federal law fashions remedies for recovery of funds or property of the United States – including those from invalid tax exactions.

Id. at 28. ***See Board of Comm'ners of Jackson County Kansas v. United States,*** 308 U.S. 343 (1939).

Similarly, in ***United States v. Broward County, Fla.,*** 901 F.2d 1005 (11th Cir. 1990), the United States challenged a tax on property held in escrow until final payment was made and title had passed. Once again, the U.S. made the payments to the County, but under protest. The court held that it had subject matter jurisdiction and, in doing so, it responded to a jurisdictional argument familiar to this case -- whether an action for *assumpsit* arises only under state law within the subject matter jurisdiction of the state court. The Federal Appeals Court stated that this "misconceives the nature of the Government's claim. It was not posited upon state law, common or statutory, but upon federal law. Its action sounded in *quasi contractus* for the recovery of its treasury funds paid by mistake which resulted in the unjust enrichment of the county. . . . " ***Id.*** at 1007 (citing ***United States v. DeKalb County***, 729 F.2d 738, 741 (11 Cir. 1984).

Montana insists that its conflict with tribal sovereignty and the **Mineral Leasing Act** has already been remedied by ***Crow II***. Since the real refund cause of action lies with Westmoreland in state court, the Tribe does not have standing to collect money that it never lost in the first place. The Ninth Circuit did state in ***Crow I***, in

a footnote, that, "As to the taxes already paid by Westmoreland, however, it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid." ***Crow I,*** 650 F.2d at 1113, n. 13. An Indian tax refund case supporting this proposition is ***Ute Tribe v. State Tax Comm'n, etc.,*** 574 F.2d 1007, 1009 (10th Cir. 1978), *cert. denied* 439 U.S. 965 (1978). Without citation to authority concerning the construction of federal equitable remedies, the court stated:

> Insofar as this action seeks to have the State of Utah return sales taxes collected by the Tribe under a generalized or lump-sum claim, it must fail as these funds now in the hands of the State were paid by the buyers of the goods and not by the sellers. If anyone can seek a recovery, or refund, it is these buyers.

Id.

These arguments fail in this case for two reasons. First, footnote 13 in ***Crow I*** must be read in conjunction with footnote 19, which speculated that there was no Crow Tribal coal tax in effect before 1982. However, based upon the holding in ***Crow II*** that the area known as the "ceded strip" was, at all times relevant to this action, within the Tribe's coal tax jurisdiction, and this Court's Opinion and Order stating that the Tribe had a valid tax in place between 1976 and 1982, these footnotes are inapposite. ***Crow II,*** 819 F.2d at 898; Opinion and Order of Sept. 11, 1988 at 7. At all times relevant to this action, the non-tribal coal taxes were preempted by the operation of tribal tax laws. Second, this is not an action for a refund.

It is an action to recover taxes that would have vested in the Tribe but for the operation of Montana law.

C. Failure To Establish The Elements of Common Law Restitution

The elements of a federal claim for restitution are drawn in reference to state law. ***Wilson v. Omaha Tribe,*** 442 U.S. 653, 669 (1977). The federal court looks to state and common law for general guidance in applying an equitable doctrine. ***United States v. Pegg,*** 782 F.2d 1498, 1501 (9th Cir. 1986) (applying the principles of the **Restatement of Restitution** and California law on constructive trusts). If these sources allow an action in equity between sovereigns to reclaim invalidly collected taxes, then this action needs no reference to Westmoreland – it is a matter between the three sovereigns.

As argued by the defendants, the central issue in this case turns on the fact that the Tribe never paid any taxes, but could have collected them but for the operation of an invalid Montana law. In other words, does an award of restitution to prevent unjust enrichment require any sort of privity between the party enriched and the party that should have been enriched on the basis of tribal sovereignty? The *Ute* case, *supra,* seems to indicate that an action for a refund of taxes is only available where the plaintiff tribe originally paid the taxes, or at least reimbursed their payment. That decision, however, did not analyze the Montana principles of restitution allowing constructive trust and *assumpsit* remedies, nor did it analyze the purpose of the **Mineral Leasing Act,** to encourage tribal economic independence.

In Montana, an action for restitution may be maintained by one governmental entity against another even though the plaintiff is not the source of the funds. In ***Valley County v. Thomas***, 97 P.2d 345 (Mont. 1939), Valley County sought restitution under theories of *assumpsit* for taxes paid by a third party to a county of the wrong jurisdiction. In responding to the argument that one county could not recover against another county for lack of privity, the court stated:

> We see no reason for adopting for this jurisdiction a holding so clearly inequitable and burdensome toward the citizen; this is especially true in view of the general constitutional and legislative intent in Montana to do justice as directly as orderly processes permit, without unnecessarily circuitous, multiplicitous, or otherwise burdensome proceedings. Equity having taken jurisdiction of the injunction proceedings, there seems no reason why it should not proceed to give complete relief . . . through a money judgment.

Id. at 366. Similarly, other courts have dispensed with the requirement that the plaintiff must have initially paid the tax. ***Humboldt Co. v. Lander Co.***, 56 P. 228 (Nev. 1899) (one county sued another for taxes paid by a property owner to the county of the wrong jurisdiction). Therefore, the retention of taxes paid to the State of Montana, like the payment itself, was without authority of law and an action for recovery need not turn on the issue of privity. ***See, also, City of Norfolk v. Norfolk County,*** 91 S.E. 820 (Va. 1917); *and* ***Board of Highway Comm'rs v. Bloomington,*** 97 N.E. 280 (Ill. 1912) (an unconstitutional law will not protect the receiver of funds from an action in

quasi-contract). Instead, this action for recovery of state tax funds turns upon a finding of unjust enrichment. ***Midcoast Aviation, Inc. v. General Elec. Credit Corp.***, 907 F.2d 732, 743 (7th Cir. 1990).

Like actions for money had and received, Montana law provides general guidance in the application of a constructive trust. In Montana, constructive trusts arise from "fraud, mistake, undue influence, the violation of a trust or other wrongful acts." ***Eckart v. Hubbard,*** 602 P.2d 988, 991 (Mont. 1979). Generally, a constructive trust has the following elements:

1. a wrongful act;

2. specific property acquired by the wrongdoer must be traceable to wrongful behavior;

3. there must be a reason, in equity and fairness, why the person holding the property should not be allowed to keep it. ***Alsco-Harvard Fraud Litigation,*** 523 F.Supp. 790, 806-07 (D.D.C. 1981).

While Montana law provides a general point of reference in constructing a federal equitable remedy, it is not determinative, and it is certainly not exhaustive. As stated by the United States Supreme Court, "Once a right and a violation have been shown, the scope of a District Court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies." ***Swann v. Charlotte Mecklenburg Board of Education,*** 402 U.S. 1, 5 (1970).

The Court is bound by no unwieldy formula in constructing a remedy to neutralize an unjust enrichment, ***Burgess v. Williamson,*** 506 F.2d 870, 876 (5th Cir. 1975),

but it is constrained by the purposes of applicable federal law. ***Snepp v. United States,*** 444 U.S. 507, 510 (1979); ***Amalgamated Clothing Textile Workers v. Murdock,*** 861 F.2d 1406, 1411 (9th Cir. 1988) (the court constructed an equitable remedy to reflect the purposes of ERISA where the trustee of employee retirement funds violated his fiduciary duty).

The underlying federal purposes guiding the Court in this case were reviewed in ***Crow II***. As stated by the Ninth Circuit Court of Appeals, the purpose of the **Mineral Leasing Act** was to "revitalize tribal governments by giving them control over the lease of their lands subject to the approval of the Secretary of Interior and to promote economic development." ***Crow II,*** 819 F.2d at 895. Under this statute, the Indians are to receive the "greatest return for their property." ***Id.*** (citing S.Rep. No. 2, H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938). In addition, the court in ***Crow II*** analyzed whether the state tax infringed the Tribe's interest in self government. This interest in not inviolable because "some interference with the Tribe's economic development may be justified if the State's interests in imposing the taxes are legitimate . . . " ***Id.*** at 903.

Citing the Tribe's N.E.R.A. economic resource study, the court rejected the State's argument that its taxes did not burden the Crow Tribe's economic interests. ***Id.*** at 899. As to tribal sovereignty, the court found that the state taxes were tailored far too loosely to allow such an incursion into tribal government. ***Id.*** at 903. Consequently, from the inception of a valid Crow coal tax in 1976, the State's coal taxes on the "ceded strip" were preempted.

The findings of economic and governmental encroachment relied upon by the Court to support preemption under federal law, however, are necessarily distinguishable from those supporting a remedy for restitution. For instance, the court in ***Crow II*** found that the State did provide certain unquantified benefits to the Tribe, including a fund to handle the environmental cost associated with strip coal mining. ***Id.*** at 901. For the purposes of federal preemption, the State failed to establish that its taxes were narrowly tailored to legitimate state interests. ***Id.*** at 903. While the court in ***Crow II*** found no reason to further quantify the contributions of the state tax fund to tribal services, these issues are of great interest to this Court when balancing the equities of unjust enrichment.

To construct an equitable remedy promoting the Crow Tribe's interest in economic independence without unjustly enriching the Tribe requires a balancing of the enrichment received by both parties. The object of this endeavor is not necessarily to remove all benefit to defendant, but to remove the amount of enrichment that plaintiff can establish as unjust. ***Midcoast Aviation,*** 907 F.2d at 745. To prevail, the Tribe must "show that the possessor [of coal severance taxes] will give offense to equity and good conscience if permitted to retain it." ***Atlantic Coast Line Railroad Co. v. State of Florida,*** 295 U.S. 301, 309 (1934). In this endeavor, the court of equity must determine if there are offsetting equities that affect the level of unjust enrichment retained by the defendant. ***McDonalds Corp. v. Moore,*** 237 F.Supp. 874, 877 (W.D.S.C. 1965).

It is axiomatic that equitable remedies cut both ways. Remedies for restitution may include direct decrees in

equity, or may be calculated through set-offs and counterclaims. **Rest. Restitution §4** (1936).[1] It is a question of fact where the equities lie in this case. *See* ***McDonalds,*** 237 F.Supp. at 879. More fundamentally, it is a question of fact whether a remedy in restitution arises at all in this case. ***Burgess,*** 506 F.2d at 876.

The court of equity must consider and balance such equitable facts as the amount of money collected by the State, whether the Tribe would have collected similar amounts but for the State tax, the amount of money that the State channeled to services enriching the Tribe, and so on. Only upon inspecting the field of countervailing equities can the Court, in fairness and good conscience, impose upon the State of Montana a decree in equity to release coal severance tax funds.

Similarly, the issue of interest in this case is not determined with empirical formulas. An award of interest depends upon where the equities lie. ***McDonalds,*** 237 F.Supp. at 879; ***United States v. Sanborn,*** 135 U.S. 271, 281 (1890) (interest denied upon finding that the United States sat on its rights and failed to offer a reasonable excuse); ***Board of Commissioners,*** 308 U.S. at 350 (interest denied because its extraction would be inequitable).

The Crow Tribe has properly invoked subject matter jurisdiction in this proceeding in equity. However, the amount or type of equitable relief, if any, is entirely a point of speculation before the Court can review and

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[1] Set-offs and counterclaims in equity are governed by the same principles as set-offs and counterclaims in contract law. Rest. Restitution § 149 note.

weigh the equitable facts pertaining to both the Crow Tribe and the State of Montana. Until the Court can make a complete finding of the equitable facts, there are genuine issues of material fact prohibiting summary judgment.

II.

AMENDMENT OF PLAINTIFF-INTERVENOR'S COMPLAINT

Finally, the U.S. moves to amend the complaint to include a prayer for interest that parallels the provision that was amended into the Tribe's complaint. The State opposes this motion on the grounds that summary judgment will dispense with the case. They would have the Court hold the matter in abeyance pending the decision on the summary judgment motion. Based upon the preceding discussion, amendment is a live issue. Pursuant to **Fed.R.Civ.P. 15 (a)**, this Court finds that justice requires an alignment of pleadings between the United States and the Crow Tribe based upon their trust relationship in this case.

Accordingly,

IT IS ORDERED:

1. Defendant's motion for summary judgment is denied.

2. The Clerk of Court is directed to file the plaintiff-intervenor United States' First Amended Complaint.

3. A status conference in this action will be conducted at the hour of 1:30 o'clock p.m, on the 24th day of

January, 1991, in the Chambers of the undersigned, Federal Building, Billings, Montana. The purpose of this conference will be the scheduling of further proceedings in this matter.

The Clerk of Court shall forthwith notify the parties of the making of this order.

DONE and **DATED** this 26th day of December, 1990.

/s/ Jack D. Shanstrom
United States District Judge

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 11, 1988

Mr. Michael T. Greely
Attonrye [sic] General of Montana
Justice Bld., 215 Sanders
Helena, MT 59620-1401

Re: Montana, et al.,
v. Crow Tribe of Indians, et al.
No. 87-343

Dear Mr. Greely:

The Court today entered the following order in the above entitled case:

The judgment is affirmed. The Chief Justice would note probable jurisdiction and set the case for oral argument.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
/s/ Joseph F. Spaniol, Jr.

The CROW TRIBE OF INDIANS; Forest Horn, a member of the Crow Tribe and Chairman of Crow Tribal Council; Ted Hogan, a member of the Crow Tribe and Secretary of the Crow Tribal Council; Jiggs Yellowtail, a member of the Crow Tribe; Barney Old Coyote, a member of the Crow Tribe, Plaintiff-Appellant,

United States of America,
Plaintiff-Intervenor,

v.

STATE OF MONTANA,
Defendant-Appellee.

The CROW TRIBE OF INDIANS,
Plaintiff-Appellant,

and

United States of America,
Plaintiff-Intervenor-Appellant,

v.

The STATE OF MONTANA,
Defendant-Appellee,

and

Westmoreland; Westmoreland, Westmoreland Resources, Inc.,
Defendant-Intervenor-Appellee.

Nos. 86-3842, 86-3845.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 6, 1987.

Decided June 11, 1987.

Indian tribe brought action against Montana, seeking declaratory and injunctive relief against imposition of the state's severance and gross proceeds taxes on coal belonging to the tribe. The District Court, 469 F.Supp. 154, dismissed. The tribe appealed. The Court of Appeals, 650 F.2d 1104, reversed and remanded. On remand, the District Court, District of Montana, James F. Battin, Chief Judge, 657 F.Supp. 573, upheld application of taxes to coal mined from certain area and abstained from deciding whether taxes could be imposed on coal mined on the reservation proper. The tribe appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that: (1) Montana's taxes were preempted by federal law and policy; (2) the taxes were void for infringing on tribal sovereignty; and (3) question concerning whether taxes could be applied to coal mined on the reservation proper presented justiciable controversy.

Reversed.

Clay R. Smith, Helena, Mont., and John W. Ross, Billings, Mont., for defendant-appellee.

Gerald B. Murphy, Billings, Mont., and William A. White, Philadelphia, Pa., for appellees.

Daniel M. Rosenfelt, Albuquerque, N.M., for plaintiffs-appellants.

N. Jean Bearcrane, Billings, Mont., for appellant.

Laura E. Frossard, Washington, D.C., for plaintiff-intervenor-appellant.

Appeal from the United States District Court for the District of Montana.

Before BROWNING, WRIGHT, and HALL, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

This case, which comes before us a second time, presents two primary issues: (1) does federal action preempt the application of Montana's coal taxes to coal mined on Indian tribal property; and (2) do these taxes infringe unlawfully on the Crow Indians' tribal sovereignty? We answer both questions in the affirmative and reverse the judgment of the district court.

PROCEDURAL HISTORY

This is an appeal by the Crow Tribe, with the United States intervening on behalf of the Tribe, from a district court judgment upholding the application of Montana taxes on coal extracted from tribal land. The district court abstained from deciding whether the taxes could be imposed on revenues from coal mined on the reservation proper. It found that issue nonjusticiable.

The Crow Tribe brought action against Montana in 1978, joining three Montana counties and their treasurers. That action sought declaratory and injunctive relief against the imposition of the state's severance and gross proceeds taxes on coal mined from the reservation and what has been referred to as the "ceded strip."

The district court dismissed that action for failure to state a claim. *Crow Tribe of Indians v. Montana*, 469 F.Supp. 154 (D.Mont.1979). This court reversed and remanded.

Crow Tribe of Indians v. Montana (*Crow I*), 650 F.2d 1104 (9th Cir.1981), *amended*, 665 F.2d 1390 (1982). We indicated that if the Tribe could show that the Montana taxes deprived it of "a large portion of the economic benefits of its coal," *Crow I*, 650 F.2d at 1113, or "diminish[ed] the Tribe's own power to regulate," *id.* at 1114, these taxes would conflict with federal statutes that were intended to allow Crow to regulate the development of its natural resources. Our decision provided, however, that if Montana showed that these taxes were "carefully tailored to effectuate the state's legitimate interests, [they] might survive." *Id.*

Upon remand, the district court upheld the application of Montana taxes to coal extracted from the "ceded area" and abstained from deciding whether the taxes could be imposed on revenue from coal mined on the reservation proper, 657 F.Supp. 573.

FACTS

In 1904, Congress enacted legislation requiring the Crow Tribe to cede to the United States its interests in the surface area and underlying minerals of a portion of its reservation ("the ceded strip"). Act of April 27, 1904, Ch. 1624, 33 Stat. 352; *Little Light v. Crist*, 649 F.2d 682, 685, 689 (9th Cir.1981). The United States was to hold in trust for Indians the surface area and underlying mineral rights to the ceded strip. The United States was to sell the property and pay the proceeds to the Indians. *Id.* Approximately 98% of the surface area of the "ceded strip" was conveyed to non-Indians.

The government conveyed ceded strip properties in different forms: (1) rights to both the surface area and underlying minerals and (2) rights to the surface area only. A portion of the ceded strip was never conveyed, leaving both the surface area and underlying mineral interests in a trust held by the United States for the benefit of the Crow Tribe.

In 1934, Congress enacted the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479 (1982), which returned to the various tribes previously ceded lands and underlying minerals. The Act transferred ownership rights from the United States back to the Indians. The tribes involved could choose to accept or decline the arrangement. Crow declined.

In 1958, Congress passed another Indian Restoration Act, which *required* Indians to accept ownership of vacant lands ceded previously. It restored the previously undisposed minerals to the *full* beneficial ownership of the Crow Tribe. This terminated the United States' right to lease or sell these minerals for the Tribe. The parties agree that the Tribe *owns* these minerals underlying the ceded area, but whether they are now part of the Crow reservation is disputed.

In 1972, the Tribe leased to Westmoreland Resources the rights to mine coal underlying the ceded strip. The surface area of the leased land had been sold to non-Indians. Rights to the underlying minerals had not been conveyed. Such leasing activity is governed by the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-g (1982), and regulations promulgated thereunder.

In 1975, Montana imposed two taxes on all coal producers. The first was a severance tax, "imposed on each ton of coal produced in the state." Mont.Code Ann. § 15-35-103 (1985). The rate varies from three to 30% of the coal's value, depending on quality and whether the mining is on the surface or underground.

The second tax is the gross proceeds tax, imposed on each person engaged in coal mining. Mont.Code Ann. § 15-23-701. The rate is determined by applying the relevant county's property tax to the assessed value of the coal producer's gross yield from coal contract sales. The amount varies by county and year.

Between 1975 and 1982, Westmoreland paid $53,800,000 in severance taxes and $8,100,000 in gross proceeds taxes for its ceded strip mining operations. Westmoreland has since paid $20,000,000 on these taxes to the district court registry.

In 1976, the Tribe imposed its own severance tax of 25% for coal mined on the reservation. In 1982, it enacted a similar tax for coal mined on the ceded strip. The Department of Interior rejected the latter tax because the Crow constitution disclaimed tribal jurisdiction over the ceded strip. In 1982, Westmoreland agreed to pay the tribal tax, but received credit for the coal taxes paid to Montana. Hence, it has paid no severance tax to Crow.

Interior approved the application of Crow severance taxes to coal produced on the reservation proper. In 1980, Shell Oil and Crow agreed to a lease contract for mining coal on the reservation. It required Shell to pay Crow an amount equal to the Montana coal taxes less whatever was required to be paid to the state.

Shell never began to mine, being unwilling to begin digging because it was unable to find a buyer for its coal. It surrendered its rights to the mine in December 1985.

DISCUSSION

I. Preemption

The district court found that the minerals underlying the ceded strip were technically outside the reservation boundaries. It held that tribal activities conducted outside the reservation "present different considerations" than do activities conducted within. " 'Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.' " (Quoting, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973)). The district court stated also that, in order for the taxes to be preempted, there would have to exist federal legislation that "*expressly* bars . . . Montana . . . from imposing its coal taxes." It found no express federal prohibition against the taxes and, therefore, held they were *not* preempted.

The court erred in these findings and in the conclusions of law, which we review de novo. *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). The district court's legal conclusions deviate from this court's 1981 opinion and misapply recent Supreme Court cases that establish the relevant preemption analysis. We found, contrary to the district court, that the underlying minerals are a "component of the reservation land itself."

Crow I, 650 F.2d at 1117. This follows the plain meaning of the 1958 Act, which restored to reservation status all lands returned to tribal ownership under the Act.

> Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made part of the existing reservations for such tribe or tribes.

Act of May 19, 1958, 72 Stat. 121.[1]

The law of the case as expressed in our previous opinion has been ignored. We held in *Crow I* that, irrespective of the location of the tribal coal on or off the reservation, the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1982), applied to the Tribe's coal leases. *Crow I*, 650 F.2d at 1114 n. 16.

The preemption analysis in Indian tribal cases differs from that used in other circumstances. *Crow I*, 650 F.2d at 1109 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 140, 149, 100 S.Ct. 2578, 2581, 2586, 65 L.Ed.2d 665 (1980)); *see also Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 838, 102 S.Ct. 3394, 3398, 73 L.Ed.2d 1174 (1982). Congress attaches great significance to the "firm federal policy of promoting tribal self-sufficiency and economic development." *Crow I*, 650 F.2d at 1109 (quoting *Bracker*, 448 U.S. at 140, 100 S.Ct. at 2581); *see also California v. Cabazon Band of Mission Indians*, ___ U.S. ___, 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987); *New Mexico v.*

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[1] The 1958 Act does not give the Tribe jurisdiction over the surface of the ceded strip. The Act restored only the mineral interests to tribal ownership. These interests were once part of the reservation and remain adjacent to it.

Mescalero Apache Tribe, 462 U.S. 324, 334-35, 103 S.Ct. 2378, 2386-87, 76 L.Ed.2d 611 (1983). It intended that this policy be given "broad preemptive effect." *Crow I*, 650 F.2d at 1109. Moreover, "[n]o express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the *purpose or operation* of a federal statute, regulation, or policy." *Id.* (emphasis added).

We have already indicated that the purpose of the 1938 Act was, *inter alia*, to revitalize tribal governments by giving them control over the lease of their lands subject to the approval of the Secretary of Interior, and to promote tribal economic development. *Crow I*, 650 F.2d at 1112-13; *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n. 5, 105 S.Ct. 2399, 2404 n. 5, 85 L.Ed.2d 753 (1985) (a major purpose of the 1938 Act is "to ensure that Indians receive 'the greatest return from their property' ") (quoting S.Rep. No. 2, H.R.Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938)).

If the Tribe demonstrates that the taxes imposed by the state interfered with the policies underlying the 1938 Act, the taxes will be subject to preemption. *Crow I*, 650 F.2d at 1113; *see also Cabazon*, 107 S.Ct. at 1092.

A. Interference with Tribal Economic Interests

We review for clear error the district court's finding that the Montana taxes did not interfere with federal or tribal court policies. Fed.R.Civ.P. 52(a); *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir.1985).

The district court did not find that the taxes interfered with federal Indian law and policies. Rather, it

found that Westmoreland's marketing problems were due to a decrease in coal demand from Montana's traditional coal buyers.

Montana argues that its taxes do not burden Crow's economic interests because the Tribe itself does not pay the tax. In other words, the taxes were imposed on the lessee, Westmoreland, and the Tribe had no duty to reimburse. So, says Montana, the Tribe's economic interests were not affected.

We have already rejected this argument. *Crow I*, 650 F.2d at 1113 n. 13. The state taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

Montana argues that it may impose these taxes under *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). *Colville* held that the state could tax cigarettes purchased by non-Indians at tribal smokeshops. *Id.* at 161, 100 S.Ct. at 2085. Principles of preemption and tribal self-government do not authorize Indian tribes to "market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155, 100 S.Ct. at 2082.

But the Court has distinguished *Colville* from cases in which the Tribe was trying to market a product generated on the reservation by activities in which the Tribe had a strong interest. *See Cabazon*, 107 S.Ct. at 1093-94. In *Cabazon*, the Court held that state regulation of Indian-run bingo games was preempted by federal action. *Id.* at

1092-95. Unlike the tobacco sold in *Colville*, bingo was not a product that the Indians imported for resale to non-Indians. *Id.* at 1093.

The Indians had invested considerable time and resources into the enterprise. *Id.* at 1094. The tribes there were "generating value on the reservations through activities in which they have a substantial interest." *Id.* The Court in *Cabazon* explicitly noted that this was *not* the case in *Colville*. The tribes were merely marketing their exemption from state cigarette taxes. *Id.* at 1093.

Clearly, this case resembles *Cabazon* more than it does *Colville*. The coal is the Tribe's property, a natural resource. Its lease brings revenue that represents value generated by tribal activities and in which the Tribe has a substantial interest. *Colville* does not apply.

We should consider the economic aspects and the practical effects of Montana's severance and gross proceeds taxes.[2]

The Tribe cites a study prepared by an economic research firm, referred to as the NERA report. It showed that the Montana coal tax forced coal producers to raise coal prices. That resulted in reduced demand for Montana coal. Montana's customers stopped buying from Montana producers and went to Wyoming and other

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[2] Figures submitted by the Crow Tribe tell us that the Montana taxes totalled an effective rate of 32.9%, more than twice that of any other state's coal taxes. Montana counters that the effective rate is 21-22%. It appears that experts for the parties reached different results because they used different methods of calculating the effective tax rates.

states that have lower coal taxes. The report says that in 1975, before the taxes were imposed, Montana accounted for 40.6% of the Northern Great Plains coal output. Wyoming produced 43.8%. In each subsequent year, Montana has lost, while Wyoming has gained, in the percentage of this region's coal production. By 1982, Montana produced 18.2%, and Wyoming 69.5%, of the region's coal output.

Production by the coal producers on Crow tribal properties fell from 7.4 to 2.78% during that time. The NERA report concluded that the taxes prevented Crow coal from competing with that of Wyoming and resulted in far less Crow coal production than would have otherwise occurred.

Montana counters that the NERA report is unreliable. It refers to testimony that the report was "grounded on a supply [and] demand theory which failed to consider adequately the myriad of factors influencing a [buyer's] determination to use certain coal." Montana's expert accounted for the differences in production by noting Wyoming coal's lower sulfur content, and the increased population in Wyoming's traditional buyer markets. Further, says Montana, the taxes when factored into total coal sales constituted only one to three percent of the price.

Montana places some emphasis also on the cost of coal transportation and says that, for distances of more than 1,100 miles, it costs less to ship Wyoming coal than it does Montana coal. This had a far greater impact on price than did the taxes, Montana argues.

From all of this, one must conclude that the taxes imposed are the components that differ most clearly

between Montana and Wyoming. The timing of the loss in coal production in Montana and the losses sustained by the Crow Tribe correspond exactly with the imposition of taxes. The district court erred in relying on transportation costs. Coal production from areas in Montana just across the Wyoming border decreased after the taxes were imposed, while the Wyoming production experienced a large increase.

Montana has failed to rebut evidence that the taxes had at least some negative impact on the coal's marketability. The district court did not find the impact of taxes to be negligible. As long as the taxes "interfere[ ] or [are] incompatible with federal and tribal interests reflected in federal law," they are deemed preempted "unless the state interests at stake are sufficient to justify the assertion of state authority." *Cabazon*, 107 S.Ct. at 1092 (quoting *Mescalero*, 462 U.S. at 333-34, 103 S.Ct. at 2386). Any finding of interference, then, would be enough to subject the state taxes to preemption. This record shows interference. The district court erred in failing to so find.

B. Legitimacy of State Interests

If the state coal taxes conflict and interfere with federal or tribal objectives, we must review the legitimacy of the state's interests, and the relationships of the taxes to achieving those interests. *Crow I*, 650 F.2d at 1113-14; *see also Bracker*, 448 U.S. at 148-49, 100 S.Ct. at 2586 (to justify its assessment of taxes, state must identify a regulatory function or a service it performs).

We have identified interests that we thought might justify these taxes: (a) the additional government services required by miners and others involved in coal production; and (b) the costs of treating the pollution and solid waste disposal that attend coal production. *Crow I*, 650 F.2d at 1114.

The district court found that Montana and its political subdivisions provided numerous services to the ceded strip. It held that the costs of these services could not be documented precisely and were unquantifiable. The court said that many of coal mining's effects were unknown: "[f]or example, reclamation is not yet complete and its degree of success is uncertain." The court said that some of coal mining's effects could be identified if not precisely quantified, e.g., air and water pollution, soil and plant damage, harmed wildlife, and road wear. It noted also the socioeconomic effects of the Westmoreland mine, particularly the disruption in the lives of those living on the ceded strip. The court observed that the burden of providing services had fallen upon state and local governments, not upon the Tribe.

These findings are correct, says Montana. It cites expert testimony that the appellant's NERA report failed to consider environmental and other long term consequences of coal development. Montana contends that it is not necessary to account for all the economic and social factors in setting its tax rate.

The state cites *The Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981), which on its face seems to apply. But there the issue was

whether a state's coal severance tax violated the Commerce or Due Process Clauses because the amount of tax revenues was not "fairly related" to the government services required by coal mining. *Id.* at 620, 101 S.Ct. at 2955. That analysis differs from the one used to determine whether state actions affecting Indians are preempted by existing federal policy. In denying Montana's petition for rehearing in the previous appeal, we rejected expressly *Commonwealth Edison. Crow Tribe v. Montana*, 665 F.2d 1390, 1391 (9th Cir.1982) (amending *Crow I*).

We held that the preemption analysis requires a court to consider the state's legitimate interests. Ultimately the question is one of reviewing the state, federal, and tribal interests involved and whether, in this context, the state action is contrary to federal action.

In *Cabazon*, the Supreme Court stated that "the federal tradition of Indian immunity from state taxation is very strong and . . . *the state interest in taxation is correspondingly weak*. Accordingly, it is unnecessary to rebalance these interests in every case." 107 S.Ct. at 1091 n. 17 (emphasis added). The Supreme Court has increased the presumption against finding legitimate state interests. Hence, even if we agree with the district court that Montana taxes support legitimate interests, the interests described in *Crow I*, and argued by Montana, may no longer be sufficient.

The Court found in *Cabazon* that:

> [t]he tribal [bingo] games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of

> employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.

Id. at 1093.

The same may be said here. Coal production is vital to the economic development of the Crow Tribe. Like the bingo games, Crow's coal leases "generate funds for essential Tribal service and provide employment for Tribal members." *Id.* at 1094.

Given the significance *Cabazon* attaches to these federal and tribal interests, Montana faces a heavy burden in overcoming these with a showing of legitimate state interests. Even if Montana's interests are sufficiently legitimate, there is substantial evidence that the coal taxes are not narrowly tailored to support them.

C. Relationship Between Taxes and State Interests

The district court was unable to quantify or forecast the current or future costs resulting from coal development. It ignored hard evidence. The NERA report concluded that from 1970 to 1982, population growth associated with coal mining resulted in $38 million of government costs. But for that period, state, local, and excise taxes, *other than the coal taxes*, provided state and local governments with $42 million.

There may be additional costs associated with treating the environmental consequences of coal production,

but the state failed to provide a specific figure. Instead it would charge a heavy tax for indeterminable future costs, imposing on the Tribe the burden of the doubt.

It appears further that many of these environmental concerns have been addressed already by federal and state regulations. Montana's environmental interests are protected by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.* (1982), which imposes surface mine bonding and reclamation fee requirements. *Id.* at §§ 1258, 1269. EPA and state programs carefully regulate point source discharge from the mines.

The district court found that state taxes were narrowly tailored to achieve legitimate interests. This is undermined by Montana's use of these tax revenues. The severance tax statute requires that 50% of the revenues be allocated to a permanent trust fund and, according to the NERA report, 19 to 30% to the state general fund. Mont.Code Ann. § 15-35-108 (1985). These two funds are not dedicated to environmental or coal-related services. The three coal-related funds established by the severance tax statute were to be initially allocated 31% of the severance tax revenues. As of 1981, they received only 8.75%. This indicates a distant, rather than carefully tailored, relationship between the severance tax revenues and the coal-related services.

It appears that Montana intended, at least to some extent, to use the taxes to profit from the Indians' valuable coal resources:

> [t]he Montana legislature predicated its tax upon a finding that strip coal 'is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes.' . . . Mont.Code Ann. § 15-35-101(1)(e). By setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the economic rent.

Crow I, 650 F.2d at 1113. We stated that the Tribe's coal "is not the state's to regulate. . . . it has no such legitimate interest in appropriating Indian mineral wealth." *Id.* at 1114.

Accordingly, even if we assume Montana's interests were legitimate, the district court clearly erred in finding that the taxes were narrowly tailored to achieve them. Montana coal taxes are preempted.

II. Tribal Sovereignty

The district court concluded as a matter of law that the Montana taxes do not infringe on tribal sovereignty. It reasoned that the application of the state's coal taxes to tribal coal mined in the ceded area did not infringe upon tribal self-government because the coal lay outside the reservation. It erred in this conclusion because the minerals underlying the ceded area are owned by the Tribe and are considered part of the Crow Reservation. See *Crow I*, 650 F.2d at 1117.

The self-government doctrine differs from the preemption analysis and is an independent barrier to state regulation. *Bracker*, 448 U.S. at 142-43, 100 S.Ct. at 2583; *Crow I*, 650 F.2d at 1110. Either is a sufficient basis to hold the state tax inapplicable to tribal coal. *Bracker*, 448 U.S. at 143, 100 S.Ct. at 2583.

Whether the state taxes infringe on tribal sovereignty depends on whether tribal self-government is affected. *Crow I*, 650 F.2d at 1116. The power to tax members and non-Indians alike is an essential attribute of self-government. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201, 105 S.Ct. 1900, 1904, 85 L.Ed.2d 200 (1985). Any assertion of state authority over tribal interests must be assessed against the traditional notions of Indian sovereignty. *Mescalero*, 462 U.S. at 334, 103 S.Ct. at 2386. State action may not infringe unlawfully "on the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 142, 100 S.Ct. at 2583 (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959)).

Tribal sovereignty contains a significant geographical component, and tribes have the power to manage the use of their territory and resources by both members and nonmembers. *Mescalero*, 462 U.S. at 335, 103 S.Ct. at 2387; *Bracker*, 448 U.S. at 151, 100 S.Ct. at 2587. Taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation is not permissible absent congressional consent. *Cabazon*, 107 S.Ct. at 1091 n. 17 (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)).

While the federal tradition of Indian immunity from state taxation is very strong, *see id.*, this court has recognized that a state tax is not invalid merely because it deprives the Tribe of revenues used to sustain itself and its programs. *Crow I*, 650 F.2d at 1116. The principle of tribal self-government is to seek "an accommodation

between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville*, 447 U.S. at 156, 100 S.Ct. at 2082.

Montana taxes mineral resources that are "a component of the reservation land itself." *Crow I*, 650 F.2d at 1117. The tax revenue from coal production could generate funds for tribal services and provide employment for tribal members. *Mescalero*, 462 U.S. at 341, 103 S.Ct. at 2390. By taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development. *See Mescalero*, 462 U.S. at 341, 103 S.Ct. at 2390; *Bracker*, 448 U.S. at 149, 100 S.Ct. at 2586. While some interference with the Tribe's economic development may be justified if the state's interests in imposing the taxes are legitimate, *Crow I*, 650 F.2d at 1113; *Colville*, 447 U.S. at 163, 100 S.Ct. at 2086, the State has not shown that its taxes are narrowly tailored to meet these interests. We conclude that the Montana tax is invalid because it erodes the Tribe's sovereign authority.

III. Coal Within Reservation Boundaries

The district court declined to rule whether the taxes applied to coal mined within the external boundaries of the reservation. Although Shell Oil Company had an agreement with the Tribe to mine this coal, it never did so. Because of that, the district court found there was no substantial controversy with this issue.

We disagree. The Tribe need not wait for mining to commence to challenge the taxes' application to coal mined within the Reservation boundaries. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979) (it is not necessary to await the consummation of a threatened injury to obtain preventive relief); *State of Arizona v. Atchison, Topeka, & Santa Fe R.R. Co.*, 656 F.2d 398, 402-03 (9th Cir. 1981) (court may enter declaratory judgment as to validity of tax even though action is commenced prior to the effective date of the tax scheme).

The taxes are already in effect and Montana intends to apply them to this coal. These high taxes affect tribal revenues by interfering with the Tribe's coal leasing efforts. Because of the taxes, the lessee cannot find a buyer, making it difficult for Crow to find a lessee.

These taxes burden the Tribe's interests in coal within the Reservation boundaries, just as they do its interests in coal from the ceded strip, as these interests are the same. The reasons for disallowing these taxes on coal from the ceded strip apply with equal force to the coal within the Reservation boundaries.

CONCLUSION

Montana's coal taxes are preempted by federal law and policies. They interfere with tribal economic development and autonomy. The state interests they promote may or may not be sufficiently legitimate to overcome these conflicts, but even if they are, the taxes are not narrowly tailored in pursuit of these interests.

In addition, the taxes are void for interfering with tribal self-government, a separate and independent barrier to state regulation of Indian affairs. The mineral estate of the ceded strip is legally part of the Crow reservation, and taxing Indian income derived from activities conducted on reservation property is prohibited without congressional consent. Here, Congress did not consent. Montana's interests in imposing the coal taxes do not overcome the tribe's economic and governmental interests in coal production.

Finally, because taxes on coal mined on the ceded strip are invalid, taxes on coal from the reservation proper are likewise invalid. The district court erred in holding this question nonjusticiable. The taxes impair the tribe's ability to negotiate leases with Shell Oil and other coal companies. They also reduce tribal revenues by impairing the coal's marketability.

REVERSED.

The CROW TRIBE OF INDIANS, et al., Plaintiffs,

v.

UNITED STATES of America, et al., Plaintiff-Intervenor,

v.

STATE OF MONTANA: Ellen Feaver, Director, Montana Department of Revenue; Big Horn County, Montana; Yellowstone County, Montana; Treasure County, Montana; Lorraine Hamilton, Treasurer, Big Horn County, Montana; May Jenkins, Treasurer, Yellowstone County, Montana, Claribel Bonine, Treasurer, Treasure County, Montana, Defendants.

Westmoreland Resources, Inc., Defendant-Intervenor.

No. CV-78-110-BLG.

United States District Court,
D. Montana,
Billings Division.

Sept. 10, 1985.

Crow Indian tribe filed civil action challenging validity of Montana coal severance and gross proceeds taxes and seeking various forms of relief. The District Court, 469 F.Supp. 154, dismissed suit. On appeal, the Court of Appeals, 650 F.2d 1104, reversed and remanded. The federal government and coal producer intervened. On remand, the District Court, Battin, Chief Judge, held that: (1) no case or controversy existed warranting declaration as to validity of tax with respect to coal mined on reservation, and (2) taxes were valid insofar as applied to production of coal held by United States in trust for Crow tribe on ceded strip of land, as taxing statutes were not preempted by 1938 Indian Mineral Leasing Act or regulations promulgated thereunder, did not violate right of tribal self-government, and did not impermissibly burden interstate commerce or tax tribal trust property.

Ordered accordingly.

Reversed, 9th Cir. 819 F.2d 895.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

BATTIN, Chief Judge.

Plaintiff, the Crow Tribe of Indians, has filed this civil action challenging the validity of the Montana Coal Severance Tax and the Montana Gross Proceeds from Coal Tax insofar as these taxes are applied to coal produced on the Tribe's reservation and to coal produced on a ceded strip of land situated adjacent to the reservation. The Tribe seeks injunctive, declaratory, restitutionary, tax and money refunds, money damages, and other relief. Although this Court and the Court of Appeals considered the tax with respect to mining on both locations on a motion to dismiss, the evidence at trial led this Court to conclude that there is no case or controversy with respect to coal mined on the reservation. *See infra* Conclusion of Law II. The following findings, therefore, focus on coal mined on the ceded strip.

This matter came on for trial before the Court, sitting without a jury, on January 9, 1984. The plaintiff was represented by counsel Robert S. Pelcyger and Dale T. White of Boulder, Colorado. Defendants were represented by counsel Jerome Anderson and John W. Ross of Billings, Montana, Assistant Attorney General Chris D. Tweeten of Helena, Montana, Treasure County Attorney James R. Carlson, Jr., of Hysham, Montana, Big Horn County Attorney James E. Seykora of Hardin, Montana, and Yellowstone County David W. Hoefer of Billings, Montana. Defendant-intervenor Westmoreland Resources, Inc., was represented by Gerald B. Murphy of

Billings, Montana, and Daniel H. Israel of Denver, Colorado. The plaintiff-intervenor United States was represented by Department of Justice attorney Stephen E. Carroll. From the testimony and evidence submitted by the parties and the briefs and arguments of counsel, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Parties

1. The plaintiff, Crow Tribe of Indians, is an American Indian tribe, with the governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

2. The defendant State of Montana is a sovereign state of the Union, pursuant to the Enabling Act of February 22, 1889, 25 Stat. 676. Defendants Big Horn County, Yellowstone County, and Treasure County are political subdivisions of the State of Montana. Defendant Hamilton is Treasurer of Big Horn County; defendant Jenkins is Treasurer of Yellowstone County; defendant Bonine was Treasurer of Treasure County.

3. Defendant-Intervenor Westmoreland Resources, Inc., is a Delaware corporation having its principal place of business at Billings, Montana.

Ceded Strip – Creation and Description

4. The Crow Reservation was first set apart by the Treaty of Fort Laramie, 11 Stat. 749 (1851), and encompassed 38.5 million acres in what is now southern Montana and northern Wyoming. The second Treaty of Fort Laramie, entered into in 1868, 15 Stat. 649, reduced the Crow Reservation to 8 million acres situated entirely within what is now the State of Montana. The 1868 treaty set apart the reservation for the absolute and undisturbed use and occupation of the Crow Tribe. *Montana v. United States*, 450 U.S. 544, 547-48, 101 S.Ct. 1245, 1249, 67 L.Ed.2d 493 (1981).

5. The 1868 treaty was followed by three major cessions of territory by the Crow Tribe: the Act of April 11, 1882, 22 Stat. 42, the Act of March 3, 1891, 26 Stat. 989, and the Act of April 27, 1904, 33 Stat. 352. The third, 1904, cession reduced the Crow Reservation to its present boundaries and created the "ceded strip," an area consisting of about 1,137,500 acres which lies to the north of the acknowledged reservation.

6. Large deposits of coal underly both the Crow Reservation proper and the ceded strip.

7. Most of the surface in the ceded strip is owned in fee by non-Indians.

8. The ceded area has a population of approximately 4600. Approximately 1% of the population is Indian.

9. The ceded area has been developed by non-Indians pursuant to state and county governmental law and regulation.

10. Land use within the ceded strip is primarily range land, irrigated cropland, hay land, pasture, forest cover, and non-irrigated cropland. Rural residential housing is located throughout the ceded strip.

11. The ceded strip includes one incorporated municipality, numerous unincorporated communities, a variety of special districts, and public school districts which are governed by state law.

12. The ceded area is not a legally constituted political subdivision of the State of Montana, but it lies within the boundaries of Big Horn, Treasure, and Yellowstone Counties. It does not conform to any political or administrative boundaries for which any economic or demographic data are normally collected. It receives full governmental representation in accordance with state law. This ceded area is located in the Thirteenth and Sixteenth Judicial Districts of the District Courts in the State of Montana.

Ownership of Coal Underlying the Ceded Strip

13. In 1904, the Crow Tribe ceded "all right, title, and interest" in the area presently referred to as the ceded strip. Act of April 27, 1904, 33 Stat. 352. The United States agreed to act as trustee for the Tribe, to dispose of the ceded lands under the various reclamation, homestead, and mineral laws, and to pay the Indians the proceeds of the sales. *See* 33 Stat. at 361. The Indians released their possessory right to the ceded strip lands but retained a beneficial interest in the undisposed-of ceded lands. *See Ash Sheep Co. v. United States*, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920).

14. In accordance with the 1904 Cession Act, lands within the ceded strip were disposed of by the United States. Under § 5 of the Act, the State of Montana received sections 16 and 36 for the support of common schools. 33 Stat. at 360. Some allotments to individual Indians were made under § 4. 33 Stat. at 358-59. The remaining lands in the ceded strip were opened to homestead entries. Under § 5, lands were offered for settlement for the price of $4 per acre. The lands that could not be sold for this price were to be offered for sale at a lesser price under such presidential proclamations as were deemed necessary. Further dispositions were made under a number of presidential proclamations. *See* May 24, 1906, 34 Stat. 3200; September 9, 1910, 36 Stat. 2742; August 9, 1912, 37 Stat. 1759; September 28, 1914, 38 Stat. 2029; and April 6, 1917, 40 Stat. 1653.

15. Under the 1904 Act and these various proclamations, a considerable amount of both surface land and mineral estate was conveyed to non-Indians. A few thousand acres of surface lands were never conveyed. The patents issued to non-Indians for approximately 70,000 acres of coal lands expressly excluded rights to the underlying minerals in favor of the United States.

16. In 1934, Congress enacted the Indian Reorganization Act (IRA). 25 U.S.C. § 461 et seq. Under § 3 of the IRA, 25 U.S.C. § 463(a), the Secretary of the Interior was authorized to restore to tribal ownership "the remaining surplus lands of any Indian reservation opened before June 18, 1934. . . . "

17. Three months after the IRA's enactment, in September 1934, the Secretary temporarily withdrew the surplus or open Indian lands that the United States had been authorized to sell as trustee or broker for Indian tribes. 54 I.D. 559 (1934). This Secretarial Order expressly withdrew the previously undisposed-of surface lands and minerals in the Crow ceded area. *Id.* at 561-63.

18. The Secretarial Order terminated, at least temporarily, leasing by the federal government of the previously undisposed-of minerals within the ceded area pursuant to the mineral leasing laws governing public lands. In due course, the surplus or ceded lands, including previously undisposed-of mineral interests, of tribes that elected to accept the IRA were restored to tribal ownership. *See, e.g.*, 59 I.D. 393 (1947); 60 I.D. 174 (1948).

19. The Crow Tribe elected not to accept the provisions of the IRA. *See* 25 U.S.C. § 478. Consequently, these surplus or ceded lands were not restored to tribal ownership under 25 U.S.C. § 463.

20. The Act of May 19, 1958, Pub.L. No. 85-420, 72 Stat. 121, provided

> [t]hat all lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership subject to valid existing rights: . . . Crow, Montana – 10,260.95 [acres] . . . *Provided*, That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.
>
> Sec. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United

> States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.
>
> Sec. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior.

21. The two major purposes of the 1958 Act, as revealed by its legislative history, were to treat non-IRA tribes in a similar manner as IRA tribes with respect to ceded or surplus lands and to restore to tribal ownership all the surface lands and mineral interests that were withdrawn from entry by the Secretarial Order (54 I.D. 559 (1934)). S.Rep. No. 1508 (85th Cong., 2d Sess. 1-2, 2-3 (1958); H.Rep. No. 1336, 85th Cong., 2d Sess. 1-2 (1958)). Both committee reports state:

> This legislation, if enacted, will restore the lands [temporarily withdrawn by, *inter alia*, the September 1934 Order] to tribal ownership, thus terminating the right of the Federal Government to dispose of them under the cession statutes, and will assure the Indians the continued use rights.

Id. The reports expressly refer to the Secretarial Order which withdrew the previously undisposed-of ceded surface lands and mineral interests.

22. If the ceded strip minerals in which the Crow Tribe retains a beneficial interest were not restored to full tribal ownership by the 1958 Act, the Crow Tribe would not receive the same treatment as the tribes whose lands and minerals were restored under § 3 of the IRA, 25

U.S.C. § 463. *See* 60 I.D. 174 (1948); 59 I.D. 393 (1947). Similarly, excluding the Tribe's ceded strip minerals from the coverage of the 1958 Act would conflict with that Act's express purpose of fully restoring to tribal ownership all of the surface lands and minerals that had been temporarily withdrawn in September 1934.

23. No significance can be attached to the use of the term "vacant and undisposed-of ceded lands" in the 1958 Act instead of the "surplus lands" language from § 3 of the IRA. *See* 25 U.S.C. § 463. The legislative history discloses why different language was used in these similar Acts.

24. S. 1757, the bill introduced by Senators Murray and Mansfield, and H.R. 3490 and H.R. 6160, predecessor bills introduced by Representative Metcalf, had used the phrase "surplus ceded lands of the class mentioned in the Indian Reorganization Act of June 18, 1934, Section 3 (48 Stat. 984; 25 U.S.C. § 463)" in § 1 of the bills to describe the lands that would be restored to tribal ownership. In its comments on these bills, the Interior Department recommended that the lands be described instead "as vacant and undisposed of ceded lands" in order to "avoid the necessity for a cross reference" to the IRA. The Interior Department's report expressly stated that the recommended change "relate[d] to matters of form and do[es] not affect the substance of the bill." S.Rep. No. 1508, at 3; H.Rep. No. 1336, at 3.

25. The 1958 Act was intended to, and did in fact, fully restore the previously undisposed-of minerals in the Crow ceded strip to the full beneficial ownership of the Crow Tribe. The right and power of the United States to

lease or sell those minerals was terminated. This Court expressly so held in *Redding v. Morton,* CV-74-12-BLG (D.Mont.1974):

> In 1958, Congress restored to the Crow Tribe all of the undisposed of lands in the ceded area. 72 Stat. 121 (1958). The Interior Department has interpreted this series of enactments and case law to mean that the Crow Tribe owns all of the coal underlying the surface within the ceded area. Consequently, it must be concluded that the Crow Tribe was never divested of its title to coal which was not conveyed when the United States disposed of the surface land.

Id., Slip Op. at 8. The Court of Appeals did not reach the merits of the title question in the appeal of the *Redding* case. *Cady v. Morton,* 527 F.2d 786, 791, 798 (9th Cir. 1975).

26. The Act of August 14, 1958, 72 Stat. 575, amended the 1958 Act by authorizing the purchase by the federal government of the Tribe's right to some 4900 acres within the ceded area included within the Huntley Reclamation Project. The effect of the August 1958 Act was to reduce the surface lands restored under the May 1958 Act to approximately 5360 acres. S.Rep. No. 1508, at 4-5. A provision in the August 1958 Act evidences Congress' intent to restore minerals in the ceded strip to the Crow Tribe. § 1 of the August 1958 Act provides for the Tribe's retention of the minerals underlying these 4900 acres, and § 2 of that Act, 72 Stat. at 582, states "that the minerals reserved for the benefit of the Crow Tribe pursuant to Section 1 hereof shall be leased or otherwise disposed of under the laws and regulations relating to Indian trust lands."

27. The Department of the Interior has consistently treated the undisposed-of lands and minerals in the ceded area as being held in trust for the Crow Tribe. In a circular issued to explain the application of the Act of February 27, 1917, 39 Stat. 944, one of the Acts which permitted entry of the surface estate and reservation of the mineral estate, the General Land Office recognized that the Tribe retained a beneficial interest in the minerals after the surface estate was conveyed. Exhibits introduced at trial also showed that the Bureau of Indian Affairs has consistently treated the undisposed-of minerals as being held in trust for the Tribe.

28. There is a clear, consistent, and contemporaneous administrative construction by the Interior Department that the undisposed-of minerals underlying the Crow ceded area were restored to full tribal ownership by the 1958 Act. *See* Exhibits 97, 87, D-435, 128.

29. Both the Crow Tribe and Westmoreland Resources have relied on this consistent administrative interpretation. This reliance is manifested by an investment of tens of millions of dollars in a coal mine.

Surface Coal Mining on the Ceded Strip

30. In June 1972, Westmoreland, a non-Indian company, entered into two leases with the Crow Tribe to mine coal underlying about 31,000 acres of the ceded strip. One of these leases, encompassing over 16,000 acres, was cancelled in 1982 by mutual consent of Westmoreland, the Tribe, and the federal government. The second lease remains in effect and authorizes production of coal on Tract III which is located in Big Horn County on the

ceded strip in sections 25, 26, and 36, Township 1 North, Range 37 East.

31. In 1974, Westmoreland's leases were amended to reflect a renegotiation and consequent increase in the Tribe's royalty rate. Agreement was also reached to renegotiate the royalty rate in ten years to a point at or about the prevailing market rate.

32. The coal leases and subsequent amendments were the result of arm's-length negotiations between Westmoreland, the Tribe, and the federal government. The leases and amendments were subject to federal approval and were approved by the Secretary of the Interior. The Tribe was free to accept or reject the terms of the agreements.

33. In October 1972, Westmoreland began construction of its "Absaloka Mine" on Tract III. Mine facilities were built on the lease tract, and a 36-mile railroad spur line was built along Sarpy Creek to connect the minesite with the Burlington Northern line in Treasure County, Montana.

34. Surface coal mining operations at Westmoreland's Absaloka Mine commenced in Spring of 1974. Production reached 4 million tons in 1975 and has remained relatively constant, reaching a peak of 4.9 million tons in 1979 and declining since 1981. Under long-term sales contracts entered into in 1974, Westmoreland annually ships approximately 4 million tons of coal to four midwest utilities. Such deliveries are to continue through 1993.

Surface Coal Mining on the Crow Indian Reservation

35. Although negotiations have taken place between the Crow Tribe and various mining companies, and some preliminary prospecting and exploration has been accomplished, no actual mining of coal by non-Indian lessees has occurred within the boundaries of the Crow Indian Reservation.

36. In April 1983, the Secretary of the Interior approved a 1980 coal mining agreement between the Crow Tribe and Shell Oil Company for a coal tract situated in the extreme southeastern corner of the Crow Reservation immediately north of the Wyoming border. Shell has not mined coal on the reservation nor does it have any current long-term contracts to sell reservation coal.

Governmental Services and Jurisdiction on the Ceded Strip

37. Since 1904 the State of Montana and its political subdivisions have had legal authority and responsibility for the provision of public services on the ceded strip. The state and its political subdivisions exercise exclusive jurisdiction on the ceded strip.

38. Public services provided by the state and local governments to the ceded strip include general government services, public safety, health and welfare, natural resources, public works, transportation, recreation, and culture and education.

39. The state makes available services to and exercises jurisdiction over the counties containing the ceded strip and the ceded strip itself in the same manner as it

would for all other counties, or portions thereof, within the state. The state provided specific evidence that at least 11 public agencies of the state are involved in various governmental activities on the ceded strip. These state agencies include: the Department of Agriculture; Department of Commerce; Department of Fish, Wildlife, and Parks; Department of Highways; Department of Justice; Department of Health; Department of Labor; Department of State Lands; the Montana State Library; Department of Natural Resources and Conservation; and the Department of Public Service Regulation. This list does not represent the entirety of state involvement in governmental activities on the ceded strip.

40. The total cost of these services cannot be precisely documented. The state's budgeting process is a complex, interrelated system, and it is not appropriate to look at one or a few components of that system in isolation. The budgetary process is not designed to identify all monies expended in response to a certain area or taxpayer or recipient. The budgetary process and accounting system is not designed to trace funds from a taxpayer to an expenditure.

41. Big Horn, Treasure, and Yellowstone Counties have historically provided and continue to provide, numerous and various services to the ceded strip. County and local governments have jurisdictional authority on the ceded strip.

42. Throughout the ceded strip, law enforcement is provided by the counties. In some cases law enforcement is provided by a consolidated city/county law enforcement agency. A courthouse building is located in the

county seat of each County to provide administrative facilities for the function of general government in the ceded strip. The counties provide recreational facilities as well as health and welfare, library, emergency medical, and fire-fighting services. The ceded area is completely encompassed within the elementary and secondary school districts in the three counties. The extent and cost of these facilities and services are substantial as evidenced by both the value of physical assets and the budgets of the counties.

43. There are approximately 105 miles of Federal Interstate Highway, 45 miles of state primary and secondary highways, and 600 miles of paved and unpaved county roads located on the ceded strip. The county governments of Big Horn, Treasure, and Yellowstone have responsibility for paved and unpaved roads and bridges.

44. The county seat of Big Horn County is located in Hardin, Montana. The city of Hardin was specifically excluded from the Crow Indian Reservation in 1937. Act of August 31, 1937, 50 Stat. 884. Hardin provides numerous services to and is impacted by activities on the ceded strip as evidenced by its budgets. Big Horn County budgets on a county-wide basis for all necessary public services, including road construction, maintenance, and improvements, provisions for health and welfare services, fire, ambulance and police protection, and all normal incidental requirements of county services. Big Horn County operates a hospital and nursing home located in Hardin. Big Horn County has exclusively provided these services to the portion of the ceded strip in Big Horn County to the exclusion of the Crow Tribe and the Bureau

of Indian Affairs. Examples of general governmental activities provided by Big Horn County within the ceded strip include functions of the County Commissioners' office, the County Assessor, the Clerk and Recorder, Treasurer, County Clerk, Justice of the Peace, County Attorney, and County Extension Office.

45. There are 202 miles of road responsibility located on the ceded strip in Big Horn County. The Big Horn County government is the only governmental agency which maintains and repairs state secondary highways within the county. Neither the Bureau of Indian Affairs nor the Crow Tribe contributes to the maintenance of state secondary highways on the ceded strip.

46. Big Horn County, to the exclusion of the Crow Tribe and the Bureau of Indian Affairs, has fought all fires on the ceded strip in Big Horn County.

47. Big Horn County provides substantial education facilities and services on the ceded strip. High School District No. 1 is located partly on the ceded strip.

48. Treasure County is the exclusive provider of police services, judicial services, and general governmental services in that part of the ceded strip located in Treasure County, including district court, juvenile court, fire protection services, ambulance services, road and bridge construction and repair, a medical clinic, sanitary landfill services, all schools and related services, and through interlocal agreement with Rosebud County, services of the county to indigents.

49. The fire service and ambulance service are manned by volunteers who receive either no compensation or nominal compensation.

50. A large majority of the population in Treasure County resides on the ceded strip.

51. Treasure County's total budget has increased nearly fivefold since 1970 while tax revenue has only doubled. Treasure County has deleted or reduced services as a result, specifically deleting all library services, all mental health services, and delaying or postponing bridge repair, road maintenance, and construction. In recent years, Treasure County has levied the legal maximum rate for its general governmental levy, and since 1975 it has levied the legal maximum rate for the road and bridge funds.

52. Treasure County has approximately 11,000 acres of non-fee patent lands located on the ceded strip for which it receives no tax revenues or payments in lieu of taxes from the federal government, the Crow Tribe, or any other government. Treasure County provides all governmental services, including fire protection, law enforcement, and the other services for these lands.

53. Yellowstone County provides a full range of governmental services which are available to residents on that portion of the ceded strip within Yellowstone County. Yellowstone County maintains about 335 miles of roads in the ceded area. It also maintains seven parks located within the ceded area in Yellowstone County.

54. The Crow Tribe provides little or no governmental services to the ceded strip, and it has not exercised and does not exercise general civil jurisdiction in the ceded area. Neither the Crow Tribe nor the Bureau of Indian Affairs provides fire protection, roads, police, or other governmental services on the ceded strip. None of the Crow Tribe's ordinances apply on the ceded area, and in its constitution the Tribe has disclaimed jurisdiction outside of the boundaries of its reservation.

Jurisdiction and Services Related to Coal Mining on the Ceded Strip

55. Coal mining has an extensive, pervasive effect, both direct and indirect, on state and local government. The state and county governments provide numerous facilities, assistance, and services, to coal mining, which enable coal development everywhere in the state to occur in an orderly manner. The costs of these facilities, assistance, and services are difficult to document and quantify in their entirety, but the total cost is substantial.

56. State government is affected both in specific service provisions and general governmental activities by coal development occurring anywhere in the state including areas affected by the Westmoreland mine. The state government incurs costs in responding specifically to coal mining activities, both on and off the ceded strip, and to incremental demands placed on the government by coal development. Organizations and people associated with coal development have access to and utilize the entire array of state governmental activities, including those provided by the judicial, legislative, and executive branches.

57. The state and its political subdivisions had responsibility for and incurred the costs of developing and maintaining the governmental and physical infrastructure that allowed development of coal on the ceded strip. Westmoreland Resources has utilized and had the advantage of various services, facilities, or governmental structures that were in place when its mining activities commenced. These services, facilities, and governmental infrastructures were developed, maintained, and financed at substantial cost by the state and local governments.

58. It is not possible to identify and quantify the total extent of coal-related demands on or use of state services generally, or Westmoreland's demands on or use of state services. The state and the ceded strip counties have provided extensive services to and regulated the ceded strip and the Westmoreland mine. There are numerous examples demonstrating that such services are extensive and substantial. For example, the Montana Department of Commerce, which administers the Montana Coal Board grants, has made numerous grants to the area affected by Westmoreland's mining operation. The Montana Department of Health and Environmental Sciences inspects the Westmoreland Mine at least five times annually and has provided operational assistance for sewer lagoons in communities near the Westmoreland Mine. The Montana Department of Highways has constructed and maintained highways in the vicinity of the Westmoreland Mine. The Department of Justice has provided highway patrol and fire marshal activities in the vicinity of the Westmoreland Mine. The Montana Department of Labor and Industry has provided safety and

health inspections at the Westmoreland Mine and provides the unemployment and workman's compensation programs for employees at the Westmoreland Mine.

59. Governmental services used by and available to the Westmoreland Mine are indistinguishable in form from those available to other mines operating in Big Horn County and elsewhere in Montana.

60. With regard to mining and reclamation at Westmoreland's Mine; Montana has historically taken the lead and continues to take the lead and do the bulk of the regulatory work. Westmoreland's Mine is regulated in the same manner as any other surface coal mine in Montana.

61. The Montana legislature has enacted numerous mining and reclamation requirements at the insistence of its citizens. Westmoreland's mining operation has been developed and conducted pursuant to Montana's mining and reclamation and environmental requirements.

62. Numerous state permits and approvals may be required in conjunction with coal mining. The State of Montana and its political subdivisions have issued a number of permits and approvals for the Westmoreland Mine.

63. The Montana Department of State Lands has issued numerous permits and prepared several environmental impact statements on the Westmoreland Mine. The Department also reviews and inspects the Westmoreland Mine on a regular basis, and it has issued a number of notices of violation to Westmoreland.

64. The Montana Department of State Lands, even after the passage of the Federal Surface Mining Control

and Reclamation Act (SMCRA), still has the primary role with regard to regulation of mining and reclamation at Westmoreland's Mine.

65. The Crow Tribe does not have an approved mining and reclamation program which applies to the ceded area. SMCRA provides that before Indian tribes may become eligible to administer a mining and reclamation program, Congress will have to amend SMCRA, and Indian tribes will have to take various actions before the tribes can be eligible and can implement a mining and reclamation program. Neither Congress nor the Crow Tribe have taken these necessary actions.

66. The Crow Tribe does not have jurisdiction to provide services on the ceded strip. The Tribe has not provided and will not provide services to the Westmoreland Mine.

67. The roles of the federal government and the Crow Tribe with regard to coal development are limited to leasing and monitoring of production. The role of the BIA is limited primarily to receiving payments and determining how much coal is mined. The BIA responsibilities with regard to the Westmoreland Mine do not extend beyond those in the lease.

70. The only functions performed by the Crow Tribe or the BIA on the ceded strip relate to the Tribe's status as royalty owner and not to its status as sovereign. Because the Crow Tribe is not responsible for governmental services associated with coal development in the ceded strip, its interest in the ceded strip is limited to the interests of any other coal lessor.

Impacts of Surface Coal Mining on the Ceded Strip

71. In addition to responsibility for providing the infrastructure which enables coal development in the state, and more particularly on the ceded area, to occur, and for responding to ongoing administrative and service demands from Westmoreland's and others' mining activity in Montana, the state and its political subdivisions have jurisdiction over, and thus responsibility for, responding to deleterious socioeconomic, political, and governmental consequences of coal mining.

72. Impacts of coal mining are characterized by a boom and bust cycle.

73. The effects and impacts of coal mining and related activities are not limited to direct impacts of mining or mine-related activities themselves. Environmental and socioeconomic effects occur which are geographically disbursed and indirectly related to project activities but which nevertheless have the potential to require state and local governmental response.

74. An important function of state government is to assume responsibility for responding to unforeseen effects of activities such as coal mining. Despite all efforts to anticipate serious adverse effects, and despite permitting and bonding requirements, the risks of significant, costly, unforeseen effects still exist. It is the responsibility of the state to obtain compensation for assuming these risks on behalf of the state's citizens.

75. The impacts caused by coal mining and related activities, including impacts from the Westmoreland Mine, can only be partially identified and documented at

this time. Significant problems of measurement and quantification prevent an accurate and complete estimation of many of those impacts. Many of the effects and costs associated with coal mining are currently unknown. For example, reclamation is not yet complete, and its degree of success is uncertain.

76. Some impacts and effects of coal mining can be currently identified, but it is difficult to quantify precisely and entirely the costs and impacts associated with a particular coal mine. The nature of the effects of coal mining do not allow such complete quantification, and governmental accounting systems are not designed to track service provisions or utilizations by geographic area, taxpayer, or purpose.

77. The land ownership patterns, and the distribution of environmental and socioeconomic effects of coal mining, particularly at Westmoreland's mine on the ceded strip place the responsibility and burdens for response to these effects on state and local governments, in a manner similar to that of other coal mining activities in Montana.

78. Because few Crow Indians live on the ceded strip, the Tribe has a limited interest in insuring that the environment of the ceded strip and the public services available on the ceded strip are protected and maintained.

79. There is no evidence that the Crow Tribe provides any response to the impacts from mining on the ceded area.

80. Impacts from Westmoreland's mine are both socioeconomic and environmental. Some have occurred or will occur in the short term, and others will occur after a longer period of time. Some have occurred or will occur in the immediate vicinity of the mine, including the ceded strip, and others have occurred or will occur statewide.

81. Certain environment impacts can be measured, identified, and associated with the Westmoreland Mine at this time. For example, Westmoreland's mining activity has increased and will continue to increase the concentration of air borne particulates and other pollutants. There are surface and ground water effects or potential effects associated with Westmoreland's mine which may be substantial but which may not be known for a relatively long time. The Westmoreland Mine has short-term and perhaps long-term effects on soils, vegetation, and wildlife. Because reclamation at the Westmoreland Mine has only occurred over a relatively short time, it is too soon to determine what the effects of the Westmoreland Mine will be on vegetation. The effects on wildlife caused by the Westmoreland Mine depend significantly on long-term results of reclamation.

82. The Westmoreland Mine has caused impacts on state and county roads in the area requiring construction of certain roads and increased maintenance to others.

83. The socioeconomic effects of the Westmoreland Mine are also difficult to identify and document in their entirety at this time. The state of Montana and its political subdivisions, however, have incurred the major socioeconomic burdens associated with the Westmoreland Mine and assumed the risk for further adverse impacts.

For example, most of the employees at the Westmoreland Mine live off the reservation, primarily in Hardin, Montana. The Westmoreland Mine has also indirect socioeconomic effects in other areas of Montana, including Big Horn, Yellowstone, and Treasure Counties.

84. There have been substantial impacts upon residents of Big Horn and Treasure Counties as a result of the Westmoreland Mine arising from the construction of the railroad spur to that mine, increased rail traffic, and increased vehicle traffic. These impacts caused changes in the life-styles of the local residents, and many have not been compensated by Westmoreland, the Tribe, or the United States.

85. There are timing and jurisdictional mismatches of revenues and demands resulting from the Westmoreland Mine. For example, Treasure County has experienced impacts from the Westmoreland Mine to its county roads, law enforcement, and other programs which have not been offset by property or gross proceeds taxes from the Westmoreland Mine.

86. The responsibilities to respond to effects of the Westmoreland Mine to date have fallen upon the state and county governments and not upon the Crow Reservation or Crow Tribe.

Leasing of Tribally-Owned Coal – The 1938 Act

87. The development of minerals held by the United States in trust for the Crow Tribe on the ceded strip, at least after 1968, has been subject to the provisions of the 1938 Indian Mineral Leasing Act (1938 Act), 25 U.S.C. § 396a-396g.

88. The leasing activity with regard to coal located in the ceded area, including the lease issued to Westmoreland for Tract III, has taken place under the 1938 Act and the regulations promulgated under that Act, 25 C.F.R. § 211.1-.30 (1983).

89. Crow coal can now also be developed pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101, et seq. The only actual development of Crow-owned coal, however, has taken place under the authority of the 1938 Act.

90. Westmoreland's lease was issued under the 1938 Act.

The Need for Revenues on the Crow Reservation

91. Evidence presented at trial showed that there are enormous unmet needs on the Crow Indian Reservation for additional revenues to fund essential governmental programs and services for the Crow people in the areas of housing, health, employment, land acquisition, law enforcement, welfare, and education. While some of the witnesses whose testimony concerned the needs of the Crow people sought amounts of funding that might be difficult to attain even in prosperous areas, all of the witnesses identified basic needs in their specialty areas that the Crow Tribe, even with federal and state assistance, is unable to provide due to insufficient revenues.

92. Revenues gained from the development of tribally-owned coal reserves, through taxation, royalty collection, or by any other legally-sanctioned means, could significantly assist the Tribe in developing a more effective tribal government and a stronger economic base.

Montana's Coal Taxes

93. In 1975, Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the state and a gross proceeds tax on the sale of each ton of coal produced in the state. Mont.Code Ann. §§ 15-35-101 to 111 (1983) and §§ 15-23-701 to 704 (1983).

94. The Montana Coal Severance Tax, Mont.Code Ann. § 15-35-103, is "imposed on each ton of coal produced in the State." "Produced" means "severed from the earth." Mont.Code Ann. § 15-35-102. The tax is measured by the value of the "contract sales price" of the coal which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production. . . ." Mont.Code Ann. § 15-35-102. The statutory rate of tax varies from 3 to 30% of the value of the coal, depending upon the heating quality of the coal and the method by which it is mined. Mont.Code Ann. § 15-35-103.

95. Montana's coal taxes are paid quarterly by the producers, Mont.Code Ann. § 15-35-104, who then pass them forward to their utility company customers according to the terms of their coal contracts.

96. Montana has made provision for the disposition of funds gained through the coal severance tax. Mont.Code Ann. § 15-35-108. The major recipient is a permanent trust fund which was approved as a constitutional amendment by referendum. Mont. Const. Art. IX § 5. The purpose of the constitutional trust fund is to address environmental and socioeconomic impacts which may arise in the future and which may be consequences of the cessation of large-scale coal mining in Montana.

The trust fund contains only moneys collected pursuant to the coal severance tax. The principle of the fund may only be invaded on a three-fourths vote of the Montana Legislature. The Legislature may, however, appropriate the interest income earned by the fund. Approximately 25% of the coal severance tax moneys collected between July 1, 1977, and December 31, 1979, were allocated to the trust fund; 50% of the collections after that date go into the fund.

97. The remaining severance tax moneys are allocated to a variety of uses. The two largest uses are a "local impact and education trust fund account," which has received between 18 and 28% of the severance tax revenues, and the state's general fund, which has received between 19 and 40% of severance tax revenues. The remaining revenues have gone to state equalization aid to public schools, a coal area highway improvement fund, archeological preservation, various cultural projects, park acquisition and management, an alternative energy research fund, the general funds of the counties where the coal is mined, county land use planning, and a sinking fund servicing renewable resources development bond accounts. Mont.Code Ann. § 15-35-108.

98. The Gross Proceeds from Coal Tax is imposed on "each person engaged in mining coal." Mont.Code Ann. § 15-23-701. Each person mining coal must file with the State Department of Revenue an annual report that must include, among other things, a statement of the number of "tons of coal extracted, treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales

price." *Id.* The Department of Revenue transmits the valuation of the gross proceeds of the mine to the county assessor of each county in which the coal mines are located. Mont.Code Ann. § 15-23-702. The county assessor then enters the value on the assessment role, *id.*, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont.Code Ann. § 15-23-703.

99. The gross proceeds tax enacted in 1975 is substantially a reenactment of the net proceeds tax on coal at substantially the same effective rate. The net proceeds tax was first enacted in 1981. The tax generates revenue for the counties, school districts, and other local taxing entities. The rate of the gross proceeds tax is set by the local taxing entities' mill rate which is dependent upon revenue needed to operate.

100. All of the benefits of governmental services resulting from Montana's coal taxes are available to all citizens, including members of the Crow Tribe.

101. Montana's coal tax allocation structure has made it possible to make grants to communities located within the boundaries of the Crow Reservation, as evidenced by a number of Coal Board grants to the communities of Lodge Grass and Wyola, provisions in the Montana coal tax law specifically identify Indian tribes as being eligible for coal board grants.

102. Impact moneys are available from the state to aid in mitigating impacts occurring on the reservation from coal mining on the ceded strip.

History of the Coal Tax and its Legislative Justification

103. Montana's coal taxes were influenced by Montana's history of boom and bust in the mineral industry, the apparent coal boom in Montana in the early 1970's, and Montanans' desire and the Montana constitutional obligation that resource development within Montana occur without harm to the residents and environment of the state.

104. Coal tax bills were introduced in the 1973 Montana Legislature. None passed, and the legislature established an interim legislative fossil fuel study committee. The interim study committee conducted extensive studies, held public hearings, conducted extensive investigation regarding coal sales and coal taxes, and considered the short and long term impacts of coal mining. The committee reported its findings and proposed severance and gross proceeds tax legislation. After extensive debate, the legislature overwhelmingly enacted Montana's current coal taxes.

105. As stated in the April 16, 1975, "Statement to Accompany the Report of the Free Joint Conference Committees on Coal Taxation:"

> In setting the level of the tax, the conference committee looked at the needs to be met. The objectives were to (a) preserve or modestly increase the revenue going to the general fund, (b) to respond to current social impacts attributable to coal development, and (c) to invest in the future, when new technologies reduce our dependence on coal and mining activity may decline. The conference concluded that a severance tax of 20% on low grade lignite and 30% on other coal, plus a gross proceeds tax running at around 4-5% on all coal, was necessary and equitable.

Id. at 1.

106. The Montana Legislature was aware of the potential impacts and costs of mining when debating Montana's coal severance and gross proceeds taxes. The legislature believed that other environmental laws would not prevent or remedy all impacts and costs of coal mining and that a tax on coal operators was therefore necessary. Legislators supporting the coal severance and gross proceeds taxes were determined to have coal development pay its own way.

107. Because demands for services can occur both before mining operations begin and after they cease, the legislature took the position that reasonable and prudent response to large scale coal development required the establishment of a taxing and administrative structure that (1) collected adequate resources to cover current and future costs, (2) compensated the state and local jurisdictions for assuming the risk associated with these responsibilities, and (3) is flexible enough to address the issues of jurisdictional and temporal mismatch and cumulative effects. State taxing policy required that any tax levied also have uniform application, be efficient to collect, and provide a stable revenue flow.

108. The structure of Montana's coal severance tax and the distribution of coal severance tax revenues reflects the intent of the legislature to meet the needs of Montana with respect to coal mining. The structure of the tax was designed to:

(a) Allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) stabilize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections;

(d) accomplish the foregoing purposes by establishing categories of taxation which would recognize the unique character of coal.

Mont.Code Ann. § 15-35-101(2) (1983). The severance tax rates imposed were derived by the coal tax oversight committee based on its best estimate of the short and long-term costs to the state from coal mining.

109. Montana's coal taxes were not designed to prohibit coal development, but were designed to promote orderly development which would protect the environment and the interests of Montanans and to make coal development pay its fair share. A proposed moratorium on coal development in the 1974 Montana Legislature was defeated.

110. Montana's coal taxes were not designed to capture maximum economic rents or excess profits. The Montana Legislature recognized that coal development would place a variety of demands on state and local government and would benefit from the trained work force and organized society that resulted from state and local government activities. The legislature also recognized that large scale coal development imposed a risk of

environmental impact on state and local governments, on surface owners, and on all residents of the state.

111. Montana's coal severance tax was designed to address some of the major problems associated with coal development. Tax revenues were intended to provide front end financing to communities and agencies faced with rapid increases in demands for various services. Severance tax revenues are and will continue to be used to remedy problems created by jurisdictional mismatches. Severance tax revenues are also set aside for the future and will be used to respond to problems, both foreseen and unforeseen, that will arise when coal mining operations cease.

112. The Montana Legislature and the interim coal committee have the Montana severance and gross proceeds taxes under continuous review, and all citizens and coal companies are given periodic opportunities to express their views on the appropriateness of the Montana coal taxes.

The Crow Tribe's Coal Severance Tax

113. On January 31, 1976, the Crow Tribe enacted its own coal severance tax code to tax coal mined on the reservation at a statutory rate of 25%.

114. In July 1982, the Tribe enacted a new code providing for taxation on the ceded strip. The 1982 severance tax code has not been approved by the Secretary of the Interior for enforcement on the ceded strip. The Secretary has withheld approval because the Tribe lacks the

power under its constitution to levy a tax off its reservation and because the Secretary has not determined whether such power exists as a matter of federal law.

115. Any tribal tax revenue is subject to future allocation. The Tribe's tax is a general revenue tax, and the Tribe makes no claim that it would be used to offset reservation or ceded strip impacts resulting from coal mining. The Tribe has no statutory provision to allocate coal development funds to mitigate impacts or provide coal mining-related services on the ceded strip.

116. Presently, about 60% of the revenue obtained by the Crow Tribe from coal development goes to per capita distribution to tribal members.

117. Because there has been no actual mining of coal by lessees on the reservation, no revenues have been collected under the Tribe's severance tax code. The Tribe's severance tax is not applicable presently to coal produced at Westmoreland's Absaloka Mine on the ceded strip.

118. In September 1982, Westmoreland and the Crow Tribe entered into an agreement under which Westmoreland agreed to pay to the Tribe "a tax" equivalent in amount to Montana's taxes, and the Tribe agreed to give Westmoreland credit for any severance and gross proceeds taxes that Westmoreland is required to pay to the State of Montana or its political subdivisions.

119. The arrangement under which Westmoreland agreed to pay the Tribe this "tax" was proposed by the Tribe's counsel and appears to have been motivated

largely by the Tribe's desire to improve its position in this litigation.

120. The payments under this arrangement were denominated a tax to allow the producers to pass them forward to their utility customers under their coal contracts.

Application of Coal Taxes to the Westmoreland Mine.

121. Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975 pursuant to Mont.Code Ann. §§ 15-35-102 and 103. At year end 1982, Westmoreland had paid approximately $53,800,000 in severance taxes and approximately $8,100,000 in gross proceeds taxes.

122. Westmoreland has not paid any coal taxes to the Crow Tribe.

Effect of Montana's Coal Taxes on the Tribe's Royalty Interest on Ceded Strip Coal

123. There is no convincing evidence that the state's taxes affect the Crow Tribe's ability to obtain a reasonable royalty from Westmoreland.

124. The Tribe's first lease agreement with Westmoreland provided for a royalty of 17 1/4 cents per ton plus other benefits. Further negotiations in 1974 led to a lease amendment increasing the royalty payment to the Tribe to 35 cents per ton, or 6% f.o.b. mine price, whichever is greater. The 1974 agreement between the Tribe and Westmoreland also increases the royalty on future contracts to 40 cents or 8%, whichever is greater.

125. Under the 1974 agreement between the Tribe and Westmoreland, Westmoreland has agreed to renegotiate its royalty payments to the Tribe every ten years. The agreement provides that the renegotiated royalties will be set at or near the prevailing market rate.

126. The royalty payments which the Crow Tribe has negotiated from Westmoreland were recognized at the time as being among the highest anywhere, and the Tribe presented no evidence of any higher royalties being paid to any other Indian coal owner.

127. While the royalty percentage of the Tribe has increased since 1975, the percentage rate of the Montana severance tax has stayed the same, and there have in fact been adjustments to Montana's tax which reduce the effective rate of the tax, which, in turn, will reduce the disparity of total income received by the Tribe and the State of Montana.

128. The Tribe received approximately $17,877,126 in royalties from Westmoreland through October 1983. In addition to royalties, the Tribe has received other benefits from Westmoreland. For example, the Crow Tribe has an employment preference provision in its agreement with Westmoreland which results in additional money and benefits to the Tribe.

Effect of Montana's Coal Taxes on the Marketability of Ceded Strip Coal

129. There is no convincing evidence in the record that the gross proceeds tax has prevented or impeded the marketing of the Tribe's ceded strip coal. There was also no testimony that any past or present negotiations to

market Crow coal have focused on the gross proceeds tax as a marketing factor.

130. There are numerous factors which affect the marketability of Montana coal, and more specifically, the Tribe's marketing of its ceded strip coal. Although the cumulative effect of coal taxes is one of these factors, the evidence at trial showed that the tax rate, at least at present, is overshadowed by other factors.

131. During a period from 1965 to 1983, the uncertainties created by the Crow Tribe's failure to adhere to agreements or establish clear policies, procedures, and directives, regarding development of their coal became significant factors in the development or lack of development of tribally-owned coal.

132. In the early to mid-1970's, with the adoption of clean air legislation, projections of increased electrical demand, and the Arab oil embargo, there was a boom in the demand for western coal. The coal market since the mid-1970's has softened, and there is now little or no demand for additional coal. Many coal companies in several states presently have excess production capacity and have found it increasingly difficult to market coal.

133. The characteristics of coal from a particular mine are important to a utility when a decision is being made to purchase coal. The ash, chemical characteristics, and physical properties, such as moisture, BTU value, and contamination, are important considerations for existing coal-burning plants. The plants' characteristics also affect a utility's decision to purchase. For new coal-burning plants, these factors, along with delivered cost,

possibility of future cost increases, environmental considerations, reliability of source, production capacity, reserves, and alternative sources influence the utilities' purchasing decisions.

134. Transportation costs are a major factor in the marketability of coal. It is generally acknowledged that the "delivered price" of coal is the critical economic factor in any purchaser's decision. A major component of the delivered price is the rail or transportation costs. Montana's coal taxes are a relatively small percentage of delivered price. Transportation costs and distances are the major factor in determining the logical marketing area for a mine's coal production. The railroads are in a position to significantly influence the marketing of a particular coal.

135. Montana's logical coal marketing area, which includes the upper midwest and the Pacific northwest, has experience [sic] less demand for coal since 1975 than Wyoming's logical market for coal, which is the south and southwest. Demand for coal in Montana's primary market in the midwest has been relatively soft because the demand for electricity and additional coal by utilities in the midwest has declined since the mid-1970's compared to the demand for electricity and additional coal in the south and southwest.

136. While the delivered price of coal is a critical economic factor in a purchaser's coal-sourcing decision, there are other non-economic factors which sometimes require a utility to purchase a higher-priced coal. For example, there are utilities in the midwest which have

purchased coal from Wyoming which will have significantly higher delivered price than purchase of Montana coal because these utilities require the better quality of Wyoming coal for environmental reasons.

137. There is no evidence that Westmoreland has lost or will lose any particular coal contract because of Montana's coal taxes. In spite of the relatively low BTU quality of Westmoreland's coal and the high moisture content generally present in Montana coal, a Westmoreland representative expressed guarded optimism that Westmoreland could effectively compete for contracts to supply coal to three plants scheduled to be on line in the next few years. Westmoreland has a significant transportation advantage with respect to these three plants.

138. The continued competitiveness of Montana coal is also demonstrated by the fact that there have been new mines opened in Montana since the severance tax was enacted in 1975, and there have been new applications filed with the Montana Department of State Lands by other coal companies expressing a desire to open new mines in Montana. Further, Montana companies have had new contract sales since the adoption of Montana's coal taxes in 1975.

139. Based on the 1982 agreement between the Crow Tribe and Westmoreland, if the Crow Tribe prevails in this lawsuit the Tribe would receive a payment equal to the amount Westmoreland is presently required to pay to the State of Montana. Based on this agreement, there would be no change in the effect, if any, of the taxes on the marketability of ceded strip coal. The Court does

recognize, however, that the Crow Tribe-Westmoreland agreement may be changed by further negotiation.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of this matter under 28 U.S.C. §§ 1331, 1345, and 1362. Venue is established under 28 U.S.C. § 1391(b).

II.

It is inappropriate at this time to declare the rights of the parties respecting the validity of Montana's coal taxes assessed on coal produced within the external boundaries of the Crow Indian Reservation. Although the matter was considered on a motion to dismiss by both this Court and the United States Court of Appeals for the Ninth Circuit, the evidence adduced at trial indicates that there is no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). The decision to issue declaratory relief rests in the sound discretion of the trial court. *See Provident Tradesmen's Bank & Trust v. Patterson*, 390 U.S. 102, 126, 88 S.Ct. 733, 746, 19 L.Ed.2d 936 (1968). The Court is reluctant to declare whether or not the state's coal tax statutes are valid on the reservation because: (a) no severance or gross proceeds tax has been assessed or collected on the Crow Indian Reservation; (b) there is no surface coal mine on the reservation which

produces coal arguably subject to the state's coal taxes; (c) although coal mining agreements have been reached between the Tribe and non-Indian lessees, the lessees have not entered into long-term coal contracts, and, because of a slumping coal market, the mines contemplated by the agreements may not come to fruition; (d) the record lacks detail with respect to surface coal mining on the reservation; and (e) the State should have an opportunity to reassess its position with regard to taxation of on-reservation coal after final resolution of the validity of the state's taxes on tribally-owned coal on the ceded strip.

III.

Title to undisposed-of minerals underlying the ceded strip is held in trust by the United States for the Crow Indian Tribe.

(a) The second treaty of Fort Laramie, 1868, which set apart the 8 million acre Crow Reservation for undisturbed use and occupation of the Crow Tribe vested all beneficial property interests in the Tribe, including the rights to the underlying minerals. *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118, 58 S.Ct. 794, 798, 82 L.Ed. 1213 (1938).

(b) Under the 1904 Cession Act, the Tribe gave up all right, title and interest to the ceded strip, but until the lands covered by the Act were actually disposed of, the Crow Tribe retained a beneficial interest in them. The United States acted as trustee for the Tribe with respect to disposal of lands and payment of sale proceeds. *Ash Sheep*

Co. v. United States, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920); Act of April 27, 1904, 33 Stat. 352.

(c) When lands were disposed of under some of the homestead laws, *e.g.*, Act of February 27, 1917, 39 Stat. 944, only the surface estates were granted. The mineral estates were reserved to the United States, and the Tribe retained the beneficial interest in the minerals that were reserved. *See Ash Sheep Co. v. United States, supra.*

(d) The 1958 Act restoring undisposed of lands to the Crow Tribe expressly states that "all lands now or hereafter classified as vacant and undisposed-of ceded lands . . . are hereby restored to tribal ownership." The vacant and undisposed of minerals underlying the ceded strip fall within this description and are embraced by this provision of the 1958 Act. Act of May 19, 1958, Pub.L. No. 85-420, 72 Stat. 121.

(e) In spite of the language designating approximate surface acreage to be restored on named reservations, the 1958 Act restored the minerals in the ceded strip to Crow tribal ownership. Act of May 19, 1958, 72 Stat. 121; *Cf.* Solicitor's Opinion M-34836, 59 I.D. 393 (1947); Solicitor's Opinion A-25219, 60 I.D. 174 (1948). The approximate acreage figure of 10,260.95 acres listed for the Crow Reservation creates an ambiguity on the face of the statute which can only be resolved by resort to legislative history. *See DeCoteau v. District Court*, 420 U.S. 425, 447, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975). The legislative history supports the conclusion that the 1958 Act restored the ceded strip minerals to the Crow Tribe. The two major related purposes of the 1958 Act, as revealed by its legislative history, were to accord equal

treatment to the tribes that did not accept the IRA and to restore to tribal ownership all of the surface lands and minerals interests that had been temporarily withdrawn following the enactment of the IRA. *See supra* Findings of Fact 21-22. If the ceded strip minerals in which the Crow Tribe retains a beneficial interest were not restored to full tribal ownership by the 1958 Act, the Crow Tribe would not receive the same treatment as the tribes whose lands and minerals were restored under § 3 of the IRA, 25 U.S.C. § 463. *See* 60 I.D. 174 (1948); 59 I.D. 393 (1947). Similarly, excluding the Tribe's ceded strip minerals from the coverage of the 1958 Act would conflict with that Act's express purpose of fully restoring to tribal ownership all of the surface lands and minerals that had temporarily withdrawn in 1934.

(f) Courts must interpret statutes in a manner that will promote, not defeat, the purposes that Congress sought to achieve. *See Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118, 103 S.Ct. 986, 994-95, 74 L.Ed.2d 845 (1983); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 607-08, 99 S.Ct. 1905, 1910-11, 60 L.Ed.2d 508 (1979). Applying that principle of statutory construction to the 1958 Act inescapably leads to the conclusion that the "vacant and undisposed-of ceded lands" restored to the full beneficial ownership of the Crow Tribe include the previously undisposed-of mineral interests in the ceded strip in which the Tribe retained a beneficial interest.

(g) The undisposed-of ceded minerals underlying entered land were not added to and made a part of the Crow Reservation by the 1958 Act. The term "reservation

status" has little significance in describing a tribally-owned mineral estate which lies outside the surface boundaries of a tribe's reservation. The 1958 Act's legislative history provides no support for the anomalous proposition that Congress extended governmental powers and attributes of a tribe's inherent sovereignty to the subsurface estate in an area outside the boundaries of a diminished reservation where the surface is held predominantly by non-Indians.

IV.

There exists no express authorization for the imposition of Montana's coal severance and gross proceeds taxes on the mining of coal held by the United States in trust for the Crow Tribe. The Supreme Court recently held that state authorization under the 1924 Indian Mineral Leasing Act, 25 U.S.C. § 398, to tax mineral production does not extend to leases issued pursuant to the 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396a-396g. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985).

V.

The Court of Appeals recognized that mining of coal on the ceded strip created a "further complexity" in analyzing the validity of Montana's coal taxes. *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 at 1114 (9th Cir.1981). Because this case was before the Circuit on a motion to dismiss, the factual record was insufficient to allow the court to analyze fully the distinctions between state taxation on the ceded strip and state taxation on the

reservation. This Court notes that the predominant focus of the Ninth Circuit's opinion is on the larger question of state taxation on the reservation. Insofar as this Court's conclusions depart from the Ninth Circuit's opinion, the Court believes them to be justified by the full factual record and by the jurisdictional vagaries applicable to the ceded strip which were elucidated at trial.

VI.

Montana's coal taxes imposed on the production by a non-Indian mining company of coal held by the United States in trust for the Crow Indian Tribe outside the boundaries of the Crow Reservation are not preempted by federal law.

(a) An exercise of state jurisdiction is preempted when it directly conflicts with a federal enactment, *see, e.g., Kennerly v. District Court*, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971), or when federal law or policy so pervasively governs the targeted activity that there remains no room for the additional burdens sought to be imposed by the state. *See, e.g., Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965).

(b) Montana's coal taxes do not directly conflict with a congressional enactment because none exists which expressly bars the State of Montana from imposing its coal taxes on coal held by the United States in trust for the Crow Tribe. The Court finds this especially significant with respect to coal mined on the ceded strip. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973), the Supreme Court, noting that it does

not lightly imply tax exemptions, stated that tribal activities conducted outside the reservation present "different considerations" and that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49, 93 S.Ct. at 1270. The state urges that any fair reading of *Jones* leads to the conclusion that state coal taxes levied on the ceded strip are not preempted since Congress has not explicitly done so. While the Court agrees that the state's argument has force, it declines the opportunity to buttress its conclusion solely on *Jones*. Further analysis of federal policy underlying the 1938 Mineral Leasing Act, analysis which the Court of Appeals held to be applicable and which appropriately takes into account the tradition of Indian sovereignty, also leads to the conclusion that the Montana coal taxes are not preempted on the ceded strip.

(c) There exists no pervasive federal law or policy governing the leasing of tribally-owned coal that ousts a state tax on production of tribally-owned coal on the ceded strip.

(d) In determining whether a state law is preempted by pervasive federal law or policy, a court must undertake "a particularized inquiry into the nature of the state, federal, and tribal interests at stake. . . . " *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980). The standards of preemption applied in Indian law differ from those that have emerged in other areas of law. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise

of state authority has been pre-empted by operation of federal law." *Id.* at 143, 100 S.Ct. at 2583.

(e) The fact that the tribally-owned ceded strip coal lies outside the boundary of the diminished reservation is an important consideration in the preemption analysis. "The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 151, 100 S.Ct. at 2587.

(f) The Court of Appeals found that the 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396a-396f, and the regulations promulgated under that Act, constituted the potential preemptive federal law in this case. The Ninth Circuit identified and directed this Court's preemption inquiry to three goals that Congress sought to achieve in enacting the 1938 Act:

> First, the Act sought to achieve uniformity in the law governing mineral leases on Indian lands. . . . Second, the 1938 Act was designed to help achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized. . . . Third, the 1938 Act was intended to encourage tribal economic development. . . .

Crow Tribe of Indians v. State of Montana, 650 F.2d at 1112-13; *see Montana v. Blackfeet Tribe of Indians,* 105 S.Ct. at 2404 n. 5. The Tribe's arguments and evidence attempt

to prove that the latter two goals are frustrated by the imposition of Montana's coal tax.

(g) State taxation of Crow coal on the ceded strip does not hinder the revitalization of Crow tribal government. The Court of Appeals determined that in the mineral leasing context, revitalization entailed increasing of tribal government's control over decisions to lease tribal lands and over conditions to be placed on leases. Evidence at trial did not show that the Montana taxes either deprived the Tribe of control in leasing its ceded strip coal or significantly affect the rate of development of coal mining on the ceded strip. Any deterrent in the marketing of tribally-owned ceded strip coal caused by the severance and gross proceeds taxes is overshadowed by the present marketing difficulties common to all Montana coal due to a decreased market for coal in markets traditionally served by Montana coal. Coal owned by the Crow Tribe has been further disadvantaged in the marketplace by the Tribe's inability to put a marketing program in place.

(h) Discouragement, if any, of tribal economic development caused by state taxation of tribally-owned coal on the ceded strip can be justified by the state's legitimate interests in raising revenue to offset the cost of services it provides on the ceded strip, to mitigate short and long-term impacts of mining, and to perpetuate the mineral wealth subject to its general civil jurisdiction. Contrary to the Tribe's assertion, the Ninth Circuit's opinion remanding this case does not require, at least with respect to ceded strip coal, that the state establish a mathematical equilibrium between the quantifiable costs of coal development and the revenue raised by its taxes

to avoid a finding that the state's taxes are preempted by federal law. Instead, the Ninth Circuit recognized that a state's legitimate interests also include such unquantifiable interests as the value of a trained workforce, an organized government and system of laws, as well as the unquantifiable burden of future socio-economic and environmental impacts resulting from coal mining. *Crow Tribe*, 650 F.2d at 1114. The ceded strip lies within the general civil jurisdiction of the State of Montana and outside the civil jurisdiction of the Crow Tribe. The state legislature has articulated legitimate and exceedingly strong regulatory interests and responsibilities and has imposed its coal taxes accordingly. *Cf. White Mountain Apache Tribe*, 448 U.S. at 150, 100 S.Ct. at 2587. *Ramah Navaho School Board v. Bureau of Revenue*, 458 U.S. 832, 845, 102 S.Ct. 3394, 3402, 73 L.Ed.2d 1174 (1982). The state's coal taxes do not impair the Crow Tribe's ability to obtain reasonable royalty rates when tribally-owned coal is leased.

(i) Montana's coal taxes are not in conflict with tribal taxation in the ceded area. The Tribe's tax ordinances have not been approved by the Secretary of the Interior for application to off-reservation mining because the Tribe lacks power under its own constitution to tax outside the reservation boundaries. The Court notes that in 1983 the Secretary withheld approval for the Hopi severance tax in part on the ground that due process does not permit a tribe to tax an activity with which it has no governmental nexus. *See* Exhibit D-417. A challenge that the Hopi Tribe was not empowered by its constitution to impose an off-reservation severance tax on its coal was raised but not addressed in the opinion.

VII.

Montana's severance and gross proceeds taxes levied on the production of tribally-owned coal on the ceded strip do not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959).

(a) This "self-government test" is related to the pre-emption analysis insofar as federal law and policy encourage tribal self-sufficiency and economic development, but the right of tribal self-government serves as an independent barrier to the intrusive assertion of state regulatory authority over tribal reservations and members. *White Mountain Apache Tribe*, 448 U.S. at 142-43, 100 S.Ct. at 2583.

(b) In *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Supreme Court described the important considerations when the self-government test is applied to resolve a conflict between a state and an Indian tribe.

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government on one hand, and those of the State on the other. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated *on the reservation* by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate

> governmental interest in raising revenues, and that interest is likewise strongest when the tax is *directed at off-reservation value* and when the taxpayer is the recipient of state services.

Id. at 156-57, 100 S.Ct. at 2083 (citation omitted, emphasis added).

(c) *Washington v. Confederated Tribes of Colville* illustrates that the reservation boundary is a significant factor in balancing the interests of the state against those of the federal government and tribe. The self-government analysis has little applicability to cases such as this where the state seeks to tax a non-Indian company for activities engaged in outside the reservation because, while tribes do retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975), a tribe's governmental powers which arise from its retained sovereignty do not extend beyond the reservation boundaries. In 1904 the Crow Tribe relinquished its inherent authority to regulate or tax on the ceded strip and there has been no showing here that such power has been expressly returned to the Tribe by the United States. The relationship between Westmoreland Resources, Inc., and the Crow Tribe is purely contractual. Outside the reservation boundaries, on the ceded strip, this relationship carries with it no consent by Westmoreland to submit to the retained civil jurisdiction of the Crow Tribe. *Cf. Montana v. United States*, 450 U.S. 544, 565-66, 101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981). Thus, on the ceded strip, the Tribe's interest in raising revenues is weak because the Tribe lacks governmental power and other sovereign

interests which require accommodation with state interests under the self-government analysis.

(d) In any event, the self-government analysis leads to the conclusion that the state's taxes on the production of tribally-owned coal on the ceded strip are valid. A mere interest in raising revenues, even though the Tribe is in dire need of revenues to provide needed services on the reservation and to strengthen its economic base, does not in and of itself invalidate the state tax. There must be some contact between the Tribe's governmental power and the activities sought to be taxed. The Crow Tribe lacks such a connection with the off-reservation mining of its coal. The Tribe does not provide services on the ceded strip nor is it responsible for the impacts traceable to coal mining on the ceded strip. The evidence shows that the impacts of mining and the responsibilities for provision of services predominantly fall off the reservation and onto the state and local governments. With respect to ceded strip coal, the Tribe is not seeking increased revenues from a value which is generated on the reservation. The Tribe's interest in its off-reservation coal is an ownership interest which is not substantially different than the interest held by any other coal lessor. The evidence shows that this ownership interest, the royalty interest, has not been impaired by the imposition of the state's coal taxes.

VIII.

The Court concludes that the Tribe and its lessees cannot create a tax on coal produced on the ceded strip by agreement. The 1982 lease agreement between the Tribe and Westmoreland contains a clause under which

Westmoreland agreed to pay the Tribe a "tax" equal to the amount due under Montana's severance and gross proceeds tax laws with a credit for amounts actually paid to the state and local governments. Payment under this arrangement, which is collectible only because payor has consented, is simply not a tax. *See In re Lorber Industries*, 675 F.2d 1062, 1066 (9th Cir.1982).

IX.

Montana's taxes have not been shown to constitute an impermissible "multiple burden" on interstate commerce. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), the Supreme Court noted that an impermissible burden on interstate commerce could arise if both the state and tribe taxed the same mining activity or if one or both taxed the activity at a greater rate than their contact with the activity would justify. *Id.* at 158 n. 26, 102 S.Ct. at 912 n. 26. The Crow Tribe is not authorized to tax the production of coal on the ceded strip. Thus, the ceded strip is within the state's and not the Tribe's taxing jurisdiction. Therefore, the Court need not reach this interstate commerce issue with respect to the ceded strip as there can be no multiple tax burden.

X.

The Tribe has also raised a claim that Montana's coal taxes on tribally-owned coal are invalid under the Indian Commerce Clause of the Constitution, Art. I, Sec. 8, Cl. 3. The Tribe claims that the taxes are invalid because they are not authorized by Congress or, at the least, they

constitute an undue burden on Indian commerce. As the Tribe recognizes, however, the Supreme Court has found it unnecessary to modify the preemption analysis "to hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation. . . . " *Ramah Navaho School Board, Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 845, 102 S.Ct. 3394, 3402, 73 L.Ed.2d 1174 (1982). Therefore, the dormant Indian commerce clause cannot be used by the courts as an analytical avenue to the merits of cases such a [sic] that before this Court in addition to, or in lieu of, the preemption analysis absent a change in position by the Supreme Court.

XI.

This Court's finding that there is presently no approved tribal tax on the ceded strip negates the Tribe's contention that Montana must provide a credit against its taxes in the amount of analogous tribal taxes. The Court, therefore, need not entertain the merits of that claim.

XII.

Montana's coal taxes are not impermissible taxes on tribal trust property. The Tribe argues that because the taxes are in essence taxes on real property, the taxes must be viewed as being imposed ratably on both the producer's share and the royalty share. Consequently, the Tribe contends that the state cannot impose that portion of the tax attributable to the Tribe's royalty share. The Court concludes that Montana's taxes are not taxes on

tribal trust property. Both the Montana Supreme Court and the Court of Appeals have held that the legal incidence of the coal taxes falls on the producer. *See Commonwealth Edison v. Montana,* 189 Mont. 191, 615 P.2d 847, 850 (1980), *affirmed* 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981); *Crow Tribe,* 650 F.2d at 1110. The Court of Appeals has noted, however, that it did not specifically address the question of where the tax incidence on the Tribe's royalty interest lies. *See Crow Tribe v. Montana,* 665 F.2d 1390 (9th Cir.1982). The severance tax statute clearly requires the "coal mine operator" to file the tax return and pay the severance tax. Mont.Code Ann. § 15-35-104 (1983). There is no requirement that the mine operator pass the tax back to the royalty owner. Similarly, the producer must pay the gross proceeds tax and there is no requirement that the tax be assessed against the royalty interest. *See* Mont.Code Ann. §§ 15-23-701 to 704 (1983). The producer, not the holder of the royalty interest, is subject to the imposition of liens upon the coal mine and the producer's personal property should the taxes not be paid. *See* Mont.Code Ann. § 15-23-704 (1983). The evidence at trial shows that coal mine operators pass Montana's coal taxes forward to the consumer. Thus, Montana's coal taxes are not levied on tribal property. The royalty interest is merely a component of the f.o.b. price on which the taxes directed at the producer are calculated.

XIII.

For the foregoing reasons, the Court concludes that the Montana Coal Severance Tax and the Montana Gross Proceeds from Coal Tax are valid insofar as they are

applied to the production of coal held by the United States in trust for the Crow Tribe on the ceded strip.

An appropriate order shall issue in accordance with these Findings of Fact and Conclusions of Law.

CROW TRIBE OF INDIANS, Appellant,

v.

STATE OF MONTANA, and Ramon Dore, Director, Montana Department of Revenue, Appellees.

No. 79-4321.

United States Court of Appeals,
Ninth Circuit.

Jan. 5, 1982.

ORDER

Before TANG, FLETCHER and ALARCON, Circuit Judges.

The opinion 650 F.2d 1104 (9th Cir.) filed July 13, 1981 is amended as follows:

The following footnotes are added:

4a footnotes the sentence on page 1111, left-hand column, ending on line 4 with the word "tax":

> "4a. The tax incidence on the Tribe's royalty interest was not at issue and was not reached by the court."

15a footnotes the sentence on page 1114, right-hand column ending on line 21 with the citation to *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 163, 100 S.Ct. 2069, 2085, 65 L.Ed.2d 10 (1980):

> "15a. Appellees, in their petition for rehearing call to our attention *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). In that case, in the context of a challenge to the Montana coal severance tax as a

burden on interstate commerce, the Court upheld the tax against the challenge that it is not fairly related to the services provided by the state. The Court stated that wide latitude is afforded the states under the Due Process Clause in imposing taxes upon particular activities. It went on to note that no direct benefit need be shown to the class or individuals taxed, and that this latitude afforded the states is not changed merely because the taxed activity has some connection to interstate commerce. Completely different considerations are implicated in the case before us. Our task is to determine the limits of state power to tax Indian tribes, Indian-related activities and Indian trust property. Different congressional acts are at issue. Congressional policy with respect to Indian tribes is involved here, not the constitutionality of the tax. We do not find *Commonwealth Edison* to control this case as suggested by appellees."

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed.R.App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

CROW TRIBE OF INDIANS,
Plaintiff-Appellant,

v.

STATE OF MONTANA, and Ramon Dore,
Director, Montana Department of Revenue,
Defendants-Appellees.

No. 79-4321.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 14, 1980.

Decided July 13, 1981.

The United States District Court for the District of Montana, James F. Battin, Chief Judge, 469 F.Supp. 154, dismissed suit by Indian tribe seeking declaratory and injunctive relief against enforcement of state law taxing coal mined and sold in state, and tribe appealed. The Court of Appeals, Fletcher, Circuit Judge, held that allegations of Indian tribe which sought injunctive and declaratory relief against imposition of state severance and gross proceed taxes on coal mined by non-Indians from reservation and from deposits held in trust for Indians stated a cause of action.

Reversed and remanded.

Richard A. Baenen, Wilkinson, Cragun & Barker, Washington, D. C., argued, for plaintiff-appellant; Thomas J. Lynaugh, Lynaugh, Fitzgerald, Schoppert & Skaggs, Billings, Mont., Edward M. Fogarty, Wilkinson, Cragun & Barker, Washington, D. C., on brief.

Helena S. Maclay, Missoula, Mont., for defendants-appellees.

Appeal from the United States District Court For the District of Montana.

Before TANG, FLETCHER and ALARCON, Circuit Judges.

FLETCHER, Circuit Judge:

In 1975, Montana imposed severance and gross proceeds taxes on all coal mined and sold in Montana, including coal mined by non-Indians from the Crow Indian Reservation and from deposits held in trust for the Crow Tribe of Indians (Tribe). The Tribe sought injunctive and declaratory relief against the imposition of taxes on the production of non-Indian mineral lessees. The district court, 469 F.Supp. 154, dismissed the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted, and the Tribe now appeals. Our jurisdiction is based on 28 U.S.C. § 1291.

We hold that even though the incidence of these taxes falls upon non-Indian lessees, the Tribe has alleged facts that, if proved, would establish that the taxes are pre-empted by the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976), and that the taxes infringe upon the Tribe's right to govern itself. Accordingly, we reverse and remand.

I.

Vast deposits of coal underlie both the Crow Reservation proper and an adjacent area known as the "ceded strip." The ceded strip consists of about 1,137,500 acres

that were originally part of the reservation. The Crow Tribe ceded its interest in the surface estate of the area to the United States in 1904 in order to open the area to non-Indian entry and settlement, pursuant to the Act of April 27, 1904, ch. 1624, 33 Stat. 352. Although surface interests were thereafter conveyed to non-Indians, *see Cady v. Morton*, 527 F.2d 786, 789 (9th Cir. 1975), rights to minerals underlying the ceded strip were in large part retained by the United States for the benefit of the Tribe. We held recently that the ceded area is not a part of the reservation. *Little Light v. Crist*, 649 F.2d 683, 685 (9th Cir. 1981). Regardless of the status of the ceded strip, however, the underlying minerals are held by the United States Government in trust for the Tribe.

Since 1967, the Secretary of the Interior has actively encouraged the Tribe to develop its coal resources through the granting of prospecting permits and mining leases. The leasing activity has taken place under the aegis of the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976), and the regulations promulgated under the Act, 25 C.F.R. §§ 171.1-.30 (1980).

In 1972, Westmoreland Resources, a non-Indian company, entered into two mining leases with the Crow Tribe that embraced coal underlying about 31,000 acres of the ceded strip. The Tribe has also granted prospecting permits to and entered into leases with other non-Indian companies. To date, only Westmoreland Resources has actually mined coal under the leases.

In 1975, Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the state and a gross proceeds tax on the sale

of each ton of coal produced in the state. 4 Mont. Code Ann. §§ 15-35-101 through 15-35-111 and §§ 15-23-701 through 15-23-704 (1979) (formerly Mont.Rev. Code Ann. §§ 84-1312 through 84-1325 (1947)). Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975. Because Westmoreland Resources falls into the highest statutory classification, that of one who surface mines high-quality coal, it is required to pay a severance tax equal to 30 per cent of the value of the coal mined. Since 1975, Westmoreland has paid $27 million in severance taxes and $3 million in gross proceeds taxes. During the same period, Westmoreland has paid about $8 million in royalties to the Tribe under the terms of its leases.

On January 31, 1976, the Tribe enacted its own coal tax code which provides for a severance tax of 25 per cent of the value of coal mined by the Tribe's lessees. At present, the tribal severance tax applies only to coal mined on the reservation, and not to coal mined on the ceded strip.[1]

II

The Montana Coal Severance Tax, Mont. Code Ann. § 15-35-103, is "imposed on each ton of coal produced in the state." "Produced" means "severed from the earth." Mont. Code Ann. § 15-35-102. The tax is measured by the value of the "contract sales price" of the coal, which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by

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[1] *See* note 19 *infra*.

the seller to pay taxes paid on production." *Id*. The rate of tax varies from 3 to 30 per cent of the value of the coal, depending upon the quality of the coal and whether the mine is a surface or an underground mine. Mont. Code Ann. § 15-35-103. The tax is paid quarterly directly to the Montana Department of Revenue by each coal mine operator. Mont. Code Ann. § 15-35-104.

Montana has made elaborate provision for the disposition of funds gained through the coal severance tax. The major recipient is a special trust fund created by the Montana Constitution. Mont. Const. art. IX, § 5. The fund contains only monies collected pursuant to the severance tax. The principal of the fund may only be invaded on a three-fourths vote of the Montana legislature. The legislature may, however, appropriate the interest and income earned by the fund. Twenty-five per cent of the coal severance tax monies collected prior to December 31, 1979 were to go directly to the trust fund; 50 per cent of the collections after that date go into the fund.

The remaining severance tax monies are allocated to a variety of uses. The largest single use is a "local impact and education trust fund account," which is to receive between 26 and 37½ per cent of revenues. The remaining revenues go to state equalization aid to public schools, a coal area highway improvement fund, archeological preservation, various cultural projects, park acquisition and management, an alternative energy research fund, the general funds of the counties where the coal is mined, county land planning, and a sinking fund servicing renewable resource development bond accounts. Mont. Code Ann. § 15-35-108.

The Gross Proceeds from Coal Tax is imposed on "each person engaged in mining coal." Mont. Code Ann. § 15-23-701. Each person mining coal must file with the State Department of Revenue an annual report that must include, *inter alia*, a statement of the number of "tons of coal extracted, treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales price." *Id.* The Department of Revenue transmits to the county assessor of each county in which the coal mines are located the valuation of the gross proceeds of the mine. Mont. Code Ann. § 15-23-702. The county assessor then enters the value on an assessment roll, *id.*, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont. Code Ann. § 15-23-703.

III

The litigants ask us to make difficult determinations concerning the limits of state power to tax Indians and Indian-related activities. Although the issue before the Supreme Court in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), was the narrow one of whether a state may tax reservation Indians for income earned on the reservation, the Court used the occasion to describe the analytical context in which such questions are to be viewed.

The Court in *McClanahan* stated that, in recent years, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." 411 U.S. at 172, 93 S.Ct. at 1262. The Court noted, however, that it would

be a vast oversimplification to say that nothing is left of the doctrine of Indian sovereignty. *Id.* at 170, 93 S.Ct. at 1261. The doctrine remains relevant as a "backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172, 93 S.Ct. at 1262. The Court made the further observation that because the federal treaties and statutes in almost all cases do define the boundaries of federal and state jurisdiction, the extent of federal preemption and residual Indian sovereignty in the absence of federal legislation or treaty is essentially moot. *Id.* at 172 n.8, 93 S.Ct. at 1262 n.8. Finally, the Court in *McClanahan* stated that, if the state action is not pre-empted by federal legislation or treaty, the state need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1958), that state action must not infringe on the rights of reservation Indians to govern themselves. *Id.* at 171-72, 93 S.Ct. at 1261-1262.

Although the Court in *McClanahan* stated that tribal immunity from state taxation does not rest primarily on any inherent tribal sovereignty, we note that remnants of the sovereignty rationale are implicit in the holding of *McClanahan* in the form of certain presumptions. Direct state taxation of tribal property or the income of reservation Indians is presumed to be preempted, absent express congressional authorization. *Bryan v. Itasca County*, 426 U.S. 373, 376-77, 96 S.Ct. 2102, 2105-2106, 48 L.Ed.2d 710 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81, 96 S.Ct. 1634, 1642-1645, 48 L.Ed.2d 96 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973). In contrast, state taxation of non-Indian activities on the reservation can proceed without express congressional authorization,

even if the taxation affects Indians in some way. *See Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 148, 100 S.Ct. 2069, 2078, 65 L.Ed.2d 10 (1980). It is enough that such taxation does not conflict with federal statutes or treaties or interfere to an impermissible extent with the ability of the tribe to govern itself.

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), the Supreme Court discussed the principles of preemption to be applied in a case such as this. The Court noted that the test of whether a state law concerning Indians has been preempted is different from the test used to find federal preemption in other contexts. *Id.* at 140, 100 S.Ct. at 2582. The tradition of Indian independence from state control and the broad federal policies to the same end (the "backdrop" of Indian sovereignty described in *McClanahan*) color the way in which we view federal statutes and regulations affecting Indians. *Id.* The Court found that Congress intended broad preemptive effect to be accorded federal statutes and regulations when the state action in question threatens the "firm federal policy of promoting tribal self-sufficiency and economic development." *Id. See generally* D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 295-99 (1979). No express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.[2] On the other hand, legitimate

[2] Of course, state law will be preempted where Congress expressly so provides, or where the federal regulation is of such

interests of the state must be considered, and the ultimate result where the conduct of non-Indians on the reservation is involved depends on "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 149, 100 S.Ct. at 2586.

The accommodation of state and tribal interests is also central to the analysis of whether a state law infringes upon the right of reservation Indians to "make their own laws and be ruled by them." *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959)). The self-government doctrine differs from the preemption analysis in that it specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning, *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663-64 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977); vehicle registration, *Red Lake Band of Chippewa Indians v. Minnesota*, 311 Minn. 241, 248 N.W.2d 722 (1976), or the exercise of general civil jurisdiction over the members of the tribe, *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986, 86 S.Ct. 531, 15 L.Ed.2d 474 (1966); *White v. Califano*, 581 F.2d 697 (8th Cir. 1978); *California v. Quechan Tribe*, 424 F.Supp. 969

breadth that it occupies the field, leaving no room for state involvement.

(S.D.Cal. 1977), *vacated on other grounds*, 595 F.2d 1153 (9th Cir. 1979) (tribe's sovereign immunity barred suit); *United States ex rel. Rollingson v. Blackfeet Tribal Court*, 244 F.Supp. 474 (D.Mont. 1965). *See also Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970) (state has no authority to extradite Indians living on reservation). At base, however, the right of tribal self-government is a federal policy established by and subject to the will of Congress. Although self-government is related to federal preemption in the sense that both depend on congressional action and in the sense that preemption is considered in the context of the deeply ingrained traditional notions of self-government, the self-government doctrine is an independent barrier to state regulation. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. at 140, 100 S.Ct. at 2582.

IV

The Tribe initially argues that the incidence of Montana's taxes is on the Tribe. The tax is invalid, the Tribe contends, because Congress has not authorized the direct taxation of tribal mineral holdings, as required by the Supreme Court's rulings in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973), and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

This court must look to the operation of the taxing statutes to determine which party the Montana legislature intended to be liable for the tax. We find that the incidence of these taxes is on the non-Indian mineral lessee. Neither of the taxes is collected from the owner of

the mineral rights *in situ* (unless the owner also happens to be the producer),[3] and the tax is not required by law to be passed on to the owner or to any other party. *See American Oil Co. v. Neill*, 380 U.S. 451, 455-56, 85 S.Ct. 1130, 1133-1134, 14 L.Ed.2d 1 (1965); *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 346-47, 88 S.Ct. 2173, 2177-2178, 20 L.Ed.2d 1138 (1968); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99, 62 S.Ct. 1, 3, 86 L.Ed. 65 (1941). Nor is the Tribe subject to any reporting requirements in connection with the tax. Furthermore, we note that the Montana Supreme Court has held that the severance tax is levied on the producer, and that the taxable event is the act of severance. *Commonwealth Edison Co. v. Montana*, 615 P.2d 847, 850, 857 (Mont.1980), *prob. juris. noted*, ___ U.S. ___, 101 S.Ct. 607, 66 L.Ed.2d 494 (1980). The Tribe is not obligated to pay the taxes, and it cannot be held liable for deficiencies.[4]

The extent to which the economic burden of the tax is passed on to the Tribe in the form of decreased royalties is not relevant to the limited inquiry we make here to determine the legal incidence of the tax. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481-82, 96 S.Ct. 1634, 1645-1646, 48 L.Ed.2d 96 (1976); *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1255 n.2, 1256 (9th Cir. 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct.

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[3] The Tribe has not alleged that it has mined any coal itself or that it has paid any taxes directly to the State of Montana.

[4] The coal mines themselves, however, are subject to the imposition of liens in the event the taxes are not paid. Mont. Code Ann. § 15-23-704. We are not called upon to express a view on the validity of this provision as applied to Indian coal *in situ*.

1678, 52 L.Ed.2d 377 (1977); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972); *Mescalero Tribe v. O'Cheskey*, 625 F.2d 967, 970 (10th Cir. 1980). *See also United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977); *Gurley v. Rhoden*, 421 U.S. 200, 204, 207, 95 S.Ct. 1605, 1608, 1610, 44 L.Ed.2d 110 (1975); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 382 n.12, 84 S.Ct. 378, 390 n.12, 11 L.Ed.2d 389 (1964); *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 80, 58 S.Ct. 436, 438, 82 L.Ed. 673 (1938); *Lash's Prods. Co. v. United States*, 278 U.S. 175, 49 S.Ct. 100, 73 L.Ed. 251 (1929).

The Tribe argues that the ultimate intent of the Montana legislature was to tax the coal itself and thereby raise revenue, regulate the rate of production, and preserve the value of the natural resource. Our inquiry into the legislature's intent in this regard is limited to ascertaining the legal obligations imposed upon the concerned parties, however, and does not extend to divining the legislature's "true" economic object. *Gurley v. Rhoden*, 421 U.S. 200, 204-07, 95 S.Ct. 1605, 1608-1610, 44 L.Ed.2d 110 (1975). *See also United States v. Tax Comm'n of Mississippi*, 421 U.S. 599, 604-11, 95 S.Ct. 1872, 1876-1879, 44 L.Ed.2d 404 (1975); *American Oil Co. v. Neill*, 380 U.S. 451, 455-57, 85 S.Ct. 1130, 1133-1134, 14 L.Ed.2d 1 (1965); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99, 62 S.Ct. 1, 3, 86 L.Ed. 65 (1941); *Alabama v. King & Boozer*, 314 U.S. 1, 62

S.Ct. 43, 86 L.Ed. 3 (1941). *But see United States v. City of Leavenworth*, 443 F.Supp. 274, 281-82 (D.Kan. 1977).[5]

V

The Tribe argues that the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976),[6] and the

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[5] The Tribe also argues that Montana's taxes violate section 4 of the Enabling Act pursuant to which Montana was admitted to the Union. Section 4 provides:

> Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676. This disclaimer was adopted and ratified in Montana's original constitution, Mont. Const. Ord. I, 2 (1889), and in the state's new constitution. Mont. Const. art. I (1972).

Because we find that the incidence of these taxes falls on the non-Indian mineral lessee, we see no conflict between the taxes and the Enabling Act. *Truscott v. Hurlbut Land & Cattle Co.*, 73 F. 60 (9th Cir. 1896).

[6] The 1938 Act originally excluded the Crow Reservation from its coverage. 25 U.S.C. § 396f. Until 1959, mineral leasing on the Crow Reservation was governed by section 6 of the Crow Allotment Act of 1920, ch. 224, § 6, 41 Stat. 751, as amended by the Act of May 26, 1926, ch. 403, 44 Stat. 658. In 1959, Congress amended section 6 of the Crow Allotment Act of 1920 to provide that mineral leases on Crow lands were to be governed by

regulations promulgated thereunder, 25 C.F.R. §§ 171.1-.30 (1980),[7] sweep so broadly through the area of Indian mineral leasing that there is no room for state involvement.[8] *See Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 100 S.Ct. 2592, 2599, 65 L.Ed.2d 684 (1980). We need not view preemption as so comprehensive in this case because we find that the Tribe's allegations, if not controverted, would establish that the challenged Montana taxes directly and substantially thwart the policies underlying the Mineral Leasing Act of 1938.

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provisions of the 1938 Act. Act of September 16, 1959, Pub. L. No. 86-283, 73 Stat. 565. *See also* Act of May 17, 1968, Pub. L. No. 90-308, 82 Stat. 123.

[7] See also 25 C.F.R. §§ 173.1-.29 (1980).

[8] The Tribe also argues that the taxes are preempted by the Tribe's enactment of its own coal severance tax on the mining of coal underlying the reservation and ceded strip. Absent a demonstration of congressional intent to delegate authority to the Tribe to preempt Montana's taxing statutes, the tribal ordinances carry no such preemptive effect.

The Tribe will have an opportunity to demonstrate on remand that Congress intended to delegate such regulatory and preemptive authority to the Tribe, and that there is a "direct conflict between state and tribal schemes." *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10. We note in this regard that 30 U.S.C. § 1300(a) (Supp.I 1977) indicates that Congress is contemplating a delegation to Indian tribes of some authority over surface mining on Indian lands. See note 17 *infra*.

The 1938 Act[9] was designed to achieve three goals. See H.R.Rep.No.1872, 75th Cong., 3d Sess. at 1-3 (1938); S.Rep.No.985, 75th Cong., 1st Sess. 2-3 (1937); United States Dep't of Interior, *Federal Indian Law* 695 n.45 (1958). First, the Act sought to achieve uniformity in the law governing mineral leases on Indian lands. Prior law had been a statutory hodgepodge that imposed different requirements for mineral leases on different Indian lands.[10] Second, the 1938 Act was designed to help

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[9] The 1938 Act provides that an Indian tribe may lease its lands for mining purposes with the approval of the Secretary of the Interior. 25 U.S.C. § 396a. Section 396b provides for the sale of oil and gas mining leases under regulations to be prescribed by the Secretary. The Secretary is authorized to reject all bids and readvertise leases when in the Secretary's judgment that course would be in the Indians' best interests. With the Indians' consent, a lease may be privately negotiated. Section 396b also safeguards the rights of tribes organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), to enter into mining leases in accordance with the provisions of that Act and with their tribal constitutions and corporate charters. Other sections specify the type of bond to be furnished by the lessees and authorize the Secretary to promulgate regulations. 25 U.S.C. §§ 396c, 396d.

The regulations promulgated by the Secretary under authority of the 1938 Act cover many aspects of mineral leasing between tribes and non-Indian lessees, including the procedures for acquiring mineral leases, minimum rates for rentals and royalties and the manner in which payments are to be made, penalties for failure to comply with the terms of leases, information to be supplied by lessees, acreage limitations, inspections of lessees' records by Indian lessors or by Department of Interior officials, and cancellation of leases. 25 C.F.R. §§ 171.1-.30 (1980); *see also* 25 C.F.R. §§ 173.1-.29 (1980).

[10] The 1938 Act achieved uniformity by including all tribally-owned (unallotted) lands, on or off the reservation,

achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized. In the mineral leasing context, this meant giving tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary.[11] Third, the 1938 Act was intended to encourage tribal economic development, an important objective of the Indian Reorganization Act of

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within its ambit, and by repealing "[a]ll Act [sic] or parts of Acts inconsistent herewith." Section 7 of the Act, 52 Stat. at 348 (not codified but set out at 25 U.S.C. § 396a note). The latter provision probably repealed the prior leasing statutes. *See* 84 Interior Dec. 905 (1977); *cf. Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *cert. granted*, ___ U.S. ___, 101 S.Ct. 71, 66 L.Ed.2d 21 (1981) (No.80-11) (reserving the question). Since 1938, the Interior Department has operated under the 1938 Act with regard to Indian mineral leases. *See* 84 Interior Dec. 905 (1977).

[11] Early Indian mineral leasing legislation placed varying amounts of control over leasing decisions with the Indian agent in charge of the reservation, 25 U.S.C. § 397 (1976), and with the Secretary of the Interior. 25 U.S.C. § 399 (1976). The latter statute contained no provision for Indian consent to the leases and permitted the Secretary to prescribe reasonable terms and conditions. Other statutes provided that Congress could appropriate lease revenues for various purposes. 25 U.S.C. §§ 400a, 398b.

Tribal control over resources was further diluted by holdings that the Secretary had no discretion in the granting of leases once land had been declared open for prospecting. In some cases, leases were granted over tribal objections. H.R.Rep.No.1872, 75th Cong., 3d Sess. at 2 (1938); S.Rep.No.985, 75th Cong., 1st Sess. at 2 (1937).

1934. Prior to the 1938 Act, the leasing of Indian lands for mining purposes was governed by mining laws applicable to public lands generally. Technical requirements and complicated procedures under these laws had prevented the leasing of much of the Indians' land, thus depriving them of considerable revenue. *See* H.R.Rep.No.1872, 75th Cong., 3d Sess. at 2 (1938); S.Rep.No.985, 75th Cong., 1st Sess. at 2 (1937); 79 Cong.Rec. 7815 (1938) (remarks of Sen. Thomas); *id.* at 8307-08 (remarks of Sen. Thomas). The 1938 Act provided that the land was to be leased by the Indians on terms restricted only by regulations to be adopted by the Secretary pursuant to the Act.

If the allegations of the complaint are sustained at trial, the Montana Coal Severance Tax will conflict with the purposes of the 1938 Act in several respects. Most prominently, the magnitude of the tax will prevent the Tribe from receiving a large portion of the economic benefits of its coal. The Montana legislature predicated its tax upon a finding that strip coal

> is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes . . .

Mont.Code Ann. § 15-35-101(1)(e).[12] By setting the severance tax rate at 30 per cent of value, Montana made plain its intention to appropriate most of the economic rent. The substantial adverse effect on the Tribe's potential revenues is obvious when the state takes such a large

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[12] "Economic rent" is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production.

portion of this economic surplus.[13] The Tribe has alleged that, to date, Montana has realized $27 million from its severance tax while the Tribe has received only $8 million in royalties.[14]

Some economic impact on the Tribe can be justified if the state's interests in imposing the tax are legitimate.

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[13] Montana argues that the Crow Tribe has not itself paid a penny in severance taxes, that Westmoreland is the only party that has been so burdened, and that the Tribe has therefore received everything to which it was entitled under the terms of the Westmoreland lease. Thus, the state contends, the Tribe has suffered no economic hardship from the tax.

The argument is unconvincing for several reasons. First, the Tribe's complaint asks for a declaration that the tax will not apply to production under future leases that the Tribe wishes to enter into. The Tribe has alleged that the tax will reduce the royalties future lessees would be willing to pay. In this regard, we note that Shell Oil Company has asserted in its *amicus* brief that Montana's taxes severely reduce the compensation Shell can offer the Tribe in its ongoing coal lease negotiations. Furthermore, the Tribe alleges that the royalties under the Westmoreland lease are subject to renegotiation every ten years, and that the Tribe could negotiate for a greater portion of the coal's value if the severance tax were declared to be inapplicable.

As to the taxes already paid by Westmoreland, however, it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid.

[14] While none of the $27 million came out of the Crow Tribe's pocket, *see* note 13 *supra*, the disparity between the revenues of the state and those of the Tribe arguably indicates the extent to which the state is attempting to secure a large share of the economic surplus.

Of course, revenue raising to support government is a proper purpose behind most taxes. Montana's severance tax, however, has an unusual and additional purpose going far beyond revenue raising to support government. The legislative subcommittee that gave birth to Montana's system of coal taxation described the severance tax device as follows:

> Severance Taxes are levied upon a state's natural resources for several reasons. One, obviously, is the need for revenue. Another is that a state's natural resources, particularly its mineral resources, are nonrenewable. When the resources are mined, the state loses a valuable asset forever. The levying of a severance tax is one manner by which the state can share in the profits associated with the extraction of a mineral asset. . . .

Subcommittee on Fossil Fuel Taxation, Montana Legislative Council, *Fossil Fuel Taxation* 3 (Dec. 1974 Interim Study). This statement demonstrates a purpose to keep the value represented by the state's nonrenewable assets intact, for use by Montanans in the future. This purpose was implemented through the creation of the special trust fund under article IX, section 5 of the Montana Constitution. As discussed above, the fund is the major recipient of severance tax monies.[15] While the state may have an interest in perpetuating the value of mineral wealth subject to its general civil jurisdiction, it has no such legitimate interest in appropriating Indian mineral wealth.

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[15] See discussion at pp. 1108-1109 *supra*.

Furthermore, the severance tax is more than a revenue-raising device. It has regulatory purposes as well. The Subcommittee on Fossil Fuel Taxation, in describing the purposes behind severance taxes, stated

> A severance tax . . . can help discourage resource waste; a basic assumption of severance taxation is that future generations will need mineral resources similar to those used today. By being production [sic], a severance tax can encourage producers to manage their operations efficiently.

Subcommittee on Fossil Fuel Taxation, Montana Legislative Council, *Fossil Fuel Taxation* 3-4 (Dec. 1974 Interim Study). This coal is not the state's to regulate, and assertion of such authority diminishes the Tribe's own power to regulate. Such state action conflicts with the 1938 Act's purpose of allowing tribes to control the development of their mineral resources.

Montana asserts other legitimate interests, however, that if substantiated at trial may ultimately affect the outcome of the litigation. It argues that western states are burdened with the phenomenon of the "energy boomtown." Large-scale mining operations in rural areas place great strains on state and local governments to provide roads, schools, utilities, fire and police protection, recreation and health facilities, and other more subtle benefits such as a trained work force and an organized government and system of laws. Coal may be mined on the reservation or ceded strip, but the coal miner will undoubtedly be using state services and burdening state government. In addition, mining on the reservation or ceded strip could cause significant environmental effects

elsewhere, such as ground and surface water pollution, air pollution, and solid waste disposal problems. The state may encounter substantial costs in dealing with these effects.

On balance, we suspect that these legitimate interests will not be shown to be enough to save the severance tax from fatal conflict with the purposes behind the 1938 Act. A tax carefully tailored to effectuate the state's legitimate interests might survive. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 163, 100 S.Ct. 2069, 2085, 65 L.Ed.2d 10 (1980).

One further complexity deserves mention. Westmoreland is mining coal on the ceded strip. As discussed at p. 1107 *supra*, the ceded strip has been severed from the reservation proper.[16] That being the case, the balance of responsibilities between state and tribal governments may be altered to some degree. The Supreme Court has recognized that the policy of protecting Indian sovereignty involves a "significant geographical component- . . . which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148, 100 S.Ct. 2578, 2586.

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[16] Regardless of the reservation status of the surface of the ceded area, we think it clear that the Mineral Leasing Act of 1938 is applicable to the leasing of the underlying coal. See discussion at p. 1107 *supra*.

Although the non-Indian land status of the surface of the ceded strip might make a difference if the state were attempting to raise revenue to implement its legitimate regulatory responsibilities on the surface, the state has not designed its tax to meet those needs. Instead, it appears to have attempted to appropriate a portion of the value of tribal resources that has no relationship to the services, if any, it provides.[17] Inquiry in this regard can be had on remand.

As for the Gross Proceeds from Coal Tax, the record is insufficient at this stage of the proceedings to reveal what state, tribal, and federal interests may be involved, or to indicate whether the tax's impact is sufficient to thwart the policies of the 1938 Act. We find that the Tribe has made allegations sufficient to raise the possibility that the tax may conflict with the 1938 Act.

VI

The Tribe argues that Montana's taxes impermissibly infringe on the Tribe's ability to govern itself, and that the taxes therefore violate the principle articulated in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251

[17] We note that Congress has directed the Secretary of Interior to submit proposed legislation allowing tribes to assume regulatory authority under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. I 1977), over surface mining on "Indian lands." 30 U.S.C. § 1300(a). "Indian lands" are defined as "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation . . . and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9).

(1959), that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220, 79 S.Ct. at 271. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), the Supreme Court construed the *Williams v. Lee* test:

> [C]ases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179, 93 S.Ct. at 1266. We read *McClanahan* to require the reviewing court to balance the importance of the state interest in asserting the particular authority against the impact on the Tribe's ability to govern itself effectively. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1257-58 (9th Cir. 1976).

The Tribe makes two arguments with respect to the self-government test. First, it argues that the state tax infringes on the Tribe's ability to levy its own severance tax.[18] Second, the Tribe contends that the state tax deprives it of the ability to negotiate with its lessees for

[18] It is now clear that, generally speaking, tribes retain the power to tax transactions that occur on trust lands and that significantly involve a tribe or its members. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152, 100 S.Ct. 2069, 2080, 65 L.Ed.2d 10 (1980).

higher royalties and thereby restricts its ability to generate revenues needed for tribal programs.

With respect to the tribal tax argument, we think that even if the state and tribal taxes were imposed on the same activity,[19] that fact alone would not preclude the state from imposing its tax. Each taxing body is free to impose its tax, since neither tax by its terms precludes the other. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 159, 100 S.Ct. 2069, 2084, 65 L.Ed.2d 10 (1980). As a practical matter, however, it is true that Montana's tax may force the Tribe to choose between imposing its tax, thereby discouraging coal mining, or foregoing tax revenues.

In our view, the Tribe's impairment-of-tribal-tax argument raises the same concerns as the more generalized argument that the tax infringes on self-government

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[19] The Tribe's initial attempt to tax its lessees' coal production was partially frustrated by the Secretary of the Interior's refusal to sanction the Tribe's tax ordinances insofar as they applied to coal production on the ceded strip. The Secretary's refusal was based on the Tribe's constitution, which disclaimed authority over lands outside the reservation boundaries. The Tribe has since amended its constitution to allow it to tax mining activity on the ceded strip, and the tribal tax is once again being considered by the Secretary. The Secretary approved the tribal tax ordinance as it applied to the reservation proper.

Although it is true that, as far as Westmoreland's activities on the ceded strip are concerned, Montana's taxes and the tribal taxes do not presently conflict, the issue is nevertheless before us because the tribe has sought declaratory relief with regard to future mining operations on the reservation proper.

by preventing the Tribe from negotiating for higher royalties. Tribal economic enterprise is unique in that a tribe often engages in economic activity while simultaneously exercising more traditional governmental functions, such as taxation, with respect to the same activity. As a result, a tribe may obtain revenues either by manipulating the price of the goods it sells or by taxing its trading partners, where the tribe has taxing power. Which method a tribe chooses should be a matter of economic indifference to the parties, at least at the outset of the transaction.[20] The effect on tribal self-government is the same whether the state tax is seen as impairing the Tribe's ability to negotiate for higher royalties or as leaving no excess value for the Tribe to tax. Therefore, we give no special force to the Tribe's impairment-of-tribal-tax argument and view the central problem as that of the state's depriving the Tribe of potential revenues.

The Tribe has alleged that the imposition, assessment, and collection of Montana's taxes "severely impaired the ability of the sovereign Crow Tribe to serve its people through its various programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program

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[20] The form in which the Tribe gets paid for the resource could be very significant if its taxing power is not limited by contract. If the Tribe is not bound, it would be able to adjust its tax rate to changing economic conditions. In theory, this would allow it always to extract the maximum economic rent from the good or service without the necessity of renegotiating its royalty agreements.

and its reservation maintenance services." For the purpose of considering a motion for dismissal, we accept as true the allegation that the economic impact of Montana's taxes on tribal government is severe.

Tribal economic activity, while perhaps providing the wherewithal for tribal governments to sustain themselves, is at best indirectly linked to the effectiveness of tribal government. It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152-156, 100 S.Ct. 2069, 2080-2083, 65 L.Ed.2d 10 (1980).

In *Washington v. Confederated Tribes of Colville*, 447 U.S. at 156, 100 S.Ct. at 2083, however, the Supreme Court impliedly recognized that a state's power to tax may be limited when such taxes adversely affect tribal revenues arising from certain goods and services. The Court, in the course of holding that the state could tax on-reservation sales of cigarettes by Indians to non-Indians, noted that "the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest," 447 U.S. at 152, 100 S.Ct. at 2083. The Court further stated:

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. While the Tribes do have an interest in raising revenues for

> essential governmental programs, *that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.* The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U.S. at 156-157, 100 S.Ct. at 2083 (citation omitted) (emphasis supplied).

In this case, the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself. This is a not a case where the tribe is simply marketing a tax exemption, as where tribes seek to sell tax-free cigarettes to non-Indians. Any substantial incursion into the revenues obtained from the sale of the Indians' land-based wealth cuts to the heart of the Tribe's ability to sustain itself.

As we have discussed, the Montana legislature has made clear its intention to appropriate a large portion of the surplus economic value of this coal. A major purpose of the tax is to establish a fund that would keep the value of the coal for future generations of Montanans. To the extent that this tax is not related to the actual governmental costs associated with the mining of the Indian coal, *see Washington v. Confederated Tribes of Colville*, 447 U.S. at 163, 100 S.Ct. at 2086, the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land.

We find that the Tribe's complaint adequately states a claim that the Montana taxes infringe on its right to govern itself. To support the claim at trial, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable.

Reversed and remanded for proceedings consistent with this opinion.

The CROW TRIBE OF INDIANS, Forest Horn, a member of the Crow Tribe and Chairman of the Crow Tribal Council, Ted Hogan, a member of the Crow Tribe and Secretary of the Crow Tribal Council, Jiggs Yellowtail, a member of the Crow Tribe, and Barney Old Coyote, a member of the Crow Tribe, Plaintiffs,

v.

The STATE OF MONTANA, Raymon Dore, Director, Montana Department of Revenue, Margaret Wheeler, Treasurer, Big Horn County, Montana, Betty Whaley, Assessor, Big Horn County, Montana, May Jenkins, Treasurer, Yellowstone County, Montana, Karen Van Haele, Treasurer, Treasure County, Montana, and Bernice Moerkerke, Assessor, Treasure County, Montana, Defendants.

No. 78-110-BLG.

United States District Court,
D. Montana,
Billings Division.

April 3, 1979.

Individual Indians and an Indian tribe brought suit against the State of Montana and state and county officials questioning the legality of imposition of a state severance tax on coal produced by non-Indian coal mine lessees from Indian land and a certain ceded area. The District Court, Battin, Chief Judge, held, inter alia, that the severance tax was valid.

Motions to dismiss granted.

Richard A. Baenen, Edward M. Fogarty, Wilkinson, Cragun & Barker, Washington, D. C., Thomas J. Lynaugh, Lynaugh, Fitzgerald, Schoppert, Skaggs & Essman, Billings, Mont., for plaintiffs.

Helena S. Maclay and Keith C. Rennie, Jurisdiction Project, Missoula, Mont., for State of Montana.

Robert W. Corcoran, Chief Counsel, R. Bruce McGinnis, Deputy Chief Counsel, Montana State Dept. of Revenue, Helena, Mont., for Mont. Dept./Revenue.

James E. Seykora, Hardin, Mont., for Margaret Wheeler.

C. W. Jones, Deputy, Yellowstone County Atty., Billings, Mont., for Jenkins & Tooley.

J. B. Wheatcroft, Treasure County Atty., Hysham, Mont., for Van Haele and Moerkerke.

Harvey Bartle, III, Dechert, Price & Rhoads, Philadelphia, Pa., Bruce L. Ennis, R. H. Bellingham, Moulton, Bellingham, Longo & Mather, Billings, Mont., for defendants in intervention.

MEMORANDUM OPINION AND ORDER

BATTIN, Chief Judge.

I. *Background*

The plaintiffs in this case are the Crow Tribe of Indians and several individually named members of the Crow Tribe. The defendants are the State of Montana, Raymon Dore, Director of the Montana Department of Revenue, and the individually named county treasurers

and assessors for Big Horn, Yellowstone, and Treasure Counties, all in the District of Montana, and Westmoreland Resources, Inc., defendant in intervention.

For the purposes of this action, the Crow Reservation must be divided into two distinct legal entities. The Reservation proper consists of that territory granted to the Tribe by the Fort Laramie Treaty of 1851, 11 Stat. 749, II Kappler 594, as reduced by the Fort Laramie Treaty of 1868, 15 Stat. 649, II Kappler 1008, and by the Act of April 11, 1882, 22 Stat. 42, the Act of July 10, 1882, 22 Stat. 157, and by the Indian Appropriation Act of March 3, 1891, 26 Stat. 989. The "ceded area" or "ceded strip" is that area of land consisting of about 1,137,500 acres ceded by the Tribe to the United States in order to open the area to non-Indian entry and settlement, pursuant to the Act of April 27, 1904, 33 Stat. 352.

The surface estate to most of the ceded Crow land was disposed of by the Government pursuant to the provisions of the 1904 Act, but very little of the subsurface estate was ever sold by the Government. Virtually the entire Tribal mineral estate has been preserved and remains in the United States in trust and for the benefit of the Crow Tribe.

Underlying both the Reservation proper and the ceded strip are vast deposits of coal. Since 1967, the Secretary of the Interior and the Commissioner of Indian Affairs (now the Assistant Secretary of the Interior for Indian Affairs), have actively encouraged and approved prospecting permits and mining leases, all of which has brought large scale development of the coal resources underlying both the Reservation and the ceded area very

near reality. All mining and prospecting activities initiated to date have been entered into and approved pursuant to the statutory requirements of the Mineral Leasing Act of 1938 [Act of May 11, 1938], 52 Stat. 347 (codified at 25 U.S.C. §§ 396a through 396f), as well as the Department of the Interior regulations under the 1938 Act, 25 C.F.R. part 171 (1977).

To date, only one lessee, Westmoreland Resources, Inc. (hereinafter, "Westmoreland"), has undertaken active mining operations in the area in question. The successful bidder at a 1970 Bureau of Indian Affairs sale of Crow prospecting permits, Westmoreland entered into two mining leases with the Tribe in 1972. Those leases, embracing coal underlying some 30,876.25 acres of land in the ceded area, were amended in 1974 and approved later the same year.

In 1975, the State of Montana enacted a series of statutes, Revised Codes of Montana (1947) (hereinafter, "R.C.M., (1947)"), §§ 84-1312-84-1325 (now, M.C.A. §§ 15-35-101-15-35-109) by which was imposed upon coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal produced in the State. Pursuant to the Montana statutes, Westmoreland has paid, since 1975, $17,797,096.62 in severance taxes and $1,707,320 in gross proceeds taxes to the State. In that same period of time, Westmoreland has paid, pursuant to its lease, $5,514,955.06 in royalties, all of which has been paid to the Tribe.

On January 31, 1976, the Crow Tribe enacted its own coal tax code, imposing a severance tax of 25% of the

value of coal mined by lessees on the Reservation. The Crow coal tax code was approved as to taxation of coal underlying the Reservation proper, but, on March 3, 1978, was disapproved as to taxation of coal underlying the ceded area.

The Tribe has instituted this action, seeking a declaration that R.C.M., (1947) §§ 84-1312 through 84-1325 are violative of Article I, Section 8, Clause 3 of the Constitution of the United States, as the statutes invalidly impose severance and gross proceeds taxes on Crow coal. The Tribe has further sued for a declaration that the Montana statutes deprive the Tribe of rights secured to it by the Mineral Leasing Act of 1938 and the Treaty of Fort Laramie, and as such are void; for a declaration that the taxes in issue are violative of the due process provisions of the Fourteenth Amendment as well as the civil rights of the individually named plaintiffs and other members of the Tribe; and for a declaration that the State taxes impede Tribal self-government and are preempted by the Tribal ordinance imposing a severance tax on coal. Finally, the plaintiffs seek an injunction preventing the further imposition, assessment, or collection of coal severance or coal gross proceeds taxes by the defendant State of Montana.

The plaintiffs moved for, and were granted, leave to file a second amended complaint. The gravamen of the second amended complaint is that the State taxes, when imposed in conjunction with Tribal taxes, may raise the cost of producing coal under a Tribal lease to the point of economic unfeasability, with the ultimate result that coal underlying Reservation and ceded lands may suffer from

non-development. In essence, the State taxation is alleged to have:

(i) Illegally subjected the property of the sovereign Crow Tribe to an unauthorized state tax, in violation and/or derogation of Article I, Section 8, Clause 3 of the United States Constitution; the Mineral Leasing Act of 1938, as amended [citation omitted], and the Act of May 17, 1968 [citation omitted]; and the Fort Laramie Treaty of May 7, 1868 [citation omitted];

(ii) Illegally reduced the ability of the sovereign Crow Tribe and its members to realize full benefit, use and development of their land, thereby depriving them of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and of the Tribe's civil rights and the civil rights of its members;

(iii) Illegally threatened the ability of the sovereign Crow Tribe to exercise its sovereignty through its lawful tribal tax;

(iv) Illegally and severely infringed upon the right and ability of the sovereign Crow Tribe to govern itself and its people; and

(v) Illegally and severely impaired the ability of the sovereign Crow Tribe to serve its people through its various tribal programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services.

The State of Montana has moved to dismiss the second amended complaint on three grounds:

(1) The State has moved to dismiss the claims of the Tribe on the grounds that the second amended complaint fails to state a claim upon which relief may be granted.

(2) The individually named defendants, Whaley, Tooley, and Moerkerke, have moved to dismiss on the grounds that as to them the second amended complaint fails to state a claim upon which relief may be granted.

(3) The State of Montana has moved to dismiss the claims of the individually named plaintiffs, Horn, Hogan, Yellowtail, and Old Coyote, on the grounds that the Court lacks subject matter jurisdiction over their claims.

As the plaintiffs have conceded that the position of the individually named defendants is well taken, and as the plaintiffs do not object to dismissal of the second amended complaint as to those defendants, there remain only two grounds to be addressed in considering defendants' motion to dismiss.

II. *State of Montana's Motion to Dismiss For Failure to State a Claim.*

The plaintiffs have argued specifically, in opposition to the State's motion to dismiss, that the complaint in issue states a claim for the following reasons:

A) The Montana coal severance tax and gross proceeds tax are without Congressional authorization;

B) The Montana coal severance tax and gross proceeds tax impair the plaintiffs' right to self-government;

C) The Montana coal severance tax and gross proceeds tax are preempted by federal law and by the Crow tribal coal tax.

D) The Montana coal severance tax and gross proceeds tax are violative of the State's Enabling Act and Constitution.

Upon consideration of each of plaintiffs' arguments, it is evident that, on its motion to dismiss, the State of Montana must prevail.

A. *Congressional Authorization of the Montana Coal Severance and Gross Proceeds Taxes.*

In arguing that the taxes in issue are unconstitutional as applied to the coal underlying both the Reservation proper and the ceded strip, the plaintiffs have first advanced the argument that the State of Montana lacked the necessary Congressional authority to enact the taxing statutes. The bulwark of plaintiffs' argument in this regard is that Article I, Section 8, Clause 3 of the Constitution, which vests in Congress the exclusive authority "[t]o regulate Commerce . . . with the Indian Tribes", and the case law construing it, prohibit the State taxation here in issue. In analyzing plaintiffs' argument concerning the necessity of Congressional authorization, the major premise of the Tribe's argument is shown to be that, in the absence of express congressional authorization, the states are powerless to control or regulate Indian tribes or tribal trust lands. The plaintiffs rely heavily on *Mescalero Apache*

Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). In that case it was held that:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n* [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129], [State Tax Commission of Arizona] *supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent. *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148, 93 S.Ct. at 1270.

In urging *Jones* as authority for their position that congressional approval is required in order for the State taxes here in issue to be properly levied, the plaintiffs overlook two things. First, the holding of *Jones*, in which the State of New Mexico was found to have the power to impose a nondiscriminatory gross receipts tax on a ski resort operated by the tribe on off-reservation land, is substantially broader than plaintiffs have indicated. In that case, the Court stated further:

> At the outset, we reject – as did the state court – the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land." *Jones*, 411 U.S. at 147, 93 S.Ct. at 1270.

The Court further stated that, in light of New Mexico's Enabling Act:

> It is thus clear that in terms of general power New Mexico retained the right to tax, unless Congress forbade it, all Indian land and Indian activities located [on] or occurring "outside of an Indian reservation." 411 U.S. at 149-150, 93 S.Ct. at 1271.

The *Jones* case is not, as plaintiffs urge, a broad prohibition of State taxation, but rather, is limited to a prohibition of taxation by the states of land utilized by a tribe or tribal enterprise pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. In *Jones*, it is further stated that:

> Section 465 provides, in part, that "any lands or rights acquired" pursuant to any provision of the Act "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." [Footnote omitted.] On its face, the statute exempts land and rights in land, not income derived from its use. It is true that a statutory tax exemption for "lands" may, in light of its context and purposes, be construed to support an exemption for taxation on income derived from the land. [Citations omitted.] But, absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax. 411 U.S. at 155-156, 93 S.Ct. at 1274.

The second misconception nurtured by the plaintiffs throughout their argument is the assertion that the taxes here in issue are imposed upon the Tribe or upon tribal

trust land. The Montana statutes imposing the tax in issue are R.C.M. (1947) §§ 84-1314 and 84-1320-1322. Section 1314 provides:

> A severance tax is imposed upon each ton of coal produced in the state, in accordance with the following schedule: . . . A person is not liable for any severance tax upon 20,000 tons of the coal he produces in a calendar year.

Under Section 1313, "produced" means "severed from the earth." Section 1320 provides:

> Each person engaged in mining coal must, on or before March 31 each year, file with the department of revenue a statement of the gross yield from each coal mine owned or worked by such person in the proceeding [sic] calendar year and the value thereof. . . .

It is upon the basis of the report provided pursuant to § 1320 that the coal gross proceeds tax is levied.

It is evident from a reading of the taxing statutes that neither operates as a tax upon the Tribe, tribal trust lands, or the income of individual members of the Tribe. Rather, each tax is imposed upon the operators of coal mines – in this case, Westmoreland. The plaintiffs argue that, as the severance tax is imposed upon the coal, it is imposed upon a tribal trust estate. This argument must fail. Neither tax is imposed until such time as the coal has been severed from the leased realty, upon which occurrence the coal becomes the personalty of the mine operator.

The plaintiffs have not seriously contended that the State of Montana has no power to regulate Westmoreland's

operations, be they on reservation or off reservation in location. It is well settled that Montana may tax the property and receipts of Westmoreland and other non-Indian entities within the exterior boundaries of the State of Montana, whether on tribal trust land or not, *Thomas v. Gay*, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898), *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949), and congressional authorization is not required in order for the State to exercise its sovereignty.

The question of whether the Tribe, were it a mine operator, would be subject to State taxation upon coal produced on the reservation, or whether the Tribe would enjoy an immunity from State taxation is not properly before the Court at this time. However, even were the Tribe ultimately found to enjoy an immunity from State taxation of coal production, it is well settled that a non-Indian lessee of the Tribe would not share in that immunity. As the plaintiffs themselves have stated in their brief, the Mineral Leasing Act is silent on the question of taxing authority and tax immunity. Absent express statutory exemption from taxation, no such exemption may be inferred.

> This Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others. . . . If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, at 606-607, 63 S.Ct. 1284, at 1288, 87 L.Ed. 1612 (1943)

There are no allegations in the complaint that the taxes in issue violate a specific congressional prohibition of such taxation, or that they are discriminatory in effect. The only allegations plaintiffs offer are that the taxes are levied against "Crow coal", and that because the taxes are imposed against Indian or tribal realty, they must have the approval of Congress as a condition precedent to their validity. The plaintiffs' argument is clearly erroneous. The taxes in issue are levied against a non-Indian mine operator, as taxes upon personalty and income. The argument that such an obviously proper exercise of State sovereignty somehow requires prior congressional approval is without merit.

Conceptually, two relationships exist among the parties to this dispute. The Tribe, with the approval of the Secretary of the Interior and under the aegis of the Mineral Leasing Act of 1938, has entered into a mineral lease agreement with Westmoreland. That agreement has been reached in the proper procedural manner, with both parties following the administrative guidelines established by Congress and the Department of the Interior. No claim has been made by any party that the leases themselves were entered into without congressional authority or consent, and, by the admission of each party, such a claim could not properly be raised.

The second relationship in this dispute is that between Westmoreland and the State of Montana. By doing business within the State, Westmoreland has voluntarily subjected itself to the laws of the State, including those laws governing taxation. Although Montana may require congressional authorization to tax the Tribe or

individual Indians on their income, as a result of congressionally established immunity from such taxation, it cannot be said that a non-Indian lessee of the Tribe stands in the same relationship to the State as the Tribe itself. Clearly, the State of Montana need not secure the prior approval of Congress in order to tax a non-Indian enterprise doing business within the boundaries of the State. As was stated by the Supreme Court, in an opinion considering the relationship of a non-Indian lessee of Indian land to the State of Oklahoma:

> We do not imply, by this decision, that Congress does not have power to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action. [Footnote omitted.] The question whether immunity shall be extended in situations like these is essentially legislative in character. But Congress has not created an immunity here by affirmative action, [footnote omitted] and "The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." [Citations omitted.] " . . . if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 365-366, 69 S.Ct. 561, 574, 93 L.Ed. 721 (1949).

No congressional enactment conferring state tax immunity upon lessees of Indian minerals has been cited by counsel, and we are aware of none. Further, that the Indian Reorganization Act has no bearing on Westmoreland's tax obligation to the State of Montana is made

plain by *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976). In that case the Ninth Circuit held that "[w]e . . . refuse to find that the [Indian Reorganization] Act created a tax exemption for non-Indian lessees of Indian land." 543 F.2d at 1256. Further,

> When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. [Citation omitted.] Reconciliation requires that state legislation primarily directed at non-Indian lessees of Indian land be considered as not automatically preempted by the federal government in the absence of specific authorization. [Citations omitted.] To permit such non-Indians to enjoy the immunity designed for Indians requires, we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question. 543 F.2d at 1257.

Absent a specific congressional mandate to the contrary, Montana has the power, in its sovereign capacity, to tax a non-Indian enterprise within its boundaries, even if the situs of the enterprise is within the exterior boundaries of an Indian reservation. This power is freely exercisable by the State without consent or authorization of Congress. Clearly, no affirmative congressional authority exists for the Montana taxing statutes here in issue, for none is needed.

B. *Interference With Tribal Self-Government.*

It is the plaintiffs' contention with respect to the issue of whether the State taxes impede or impair tribal self-government that both because the economic effects of the tax fall upon the Tribe and because the Tribe is economically restrained from either receiving greater royalties or imposing its own tax upon coal production, the taxes in issue run afoul of the protection of tribal self-government affirmed in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), and the cases following it. The test established by *Williams* for whether a state law impairs tribal self-government, and is hence subject to attack, has been stated as:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be [governed] by them. *Williams*, 358 U.S. at 220, 79 S.Ct. at 271.

And further:

> [I]f a tribe has proved and/or a state concedes that the state [statute] causes an actual interference with the performance of the [tribe's] governmental obligations, the courts must, consistent with *Williams*, strike the [statute] down. *Confederated Tribes of Colville Reservation v. Washington*, 446 F.Supp. 1339, 1363-1364 (E.D.Wash.1978).

The Tribe rests its allegations of interference with self-government upon the relative economic benefits realized by the State and the Tribe as a result of Westmoreland's mining operations. The Tribe contends that because the

State derives more revenue through its taxation of Westmoreland's operations than does the Tribe through its royalty agreement with Westmoreland, tribal self-government is greatly impaired. However, the fact remains that the lease agreements between the Tribe and Westmoreland were freely and voluntarily entered into by both parties and approved administratively. The royalty to be paid by Westmoreland upon the coal produced pursuant to the lease must be assumed to have been a point of negotiation. As with any arm's length transaction, the Tribe was free either to accept or reject the terms offered by Westmoreland. In other words, the revenue received by the Tribe as a result of Westmoreland's operations is not, as plaintiffs argue, a result of State taxation; rather, it is a product of the Tribe's own bargaining at the time the leases were entered into by both parties.

The plaintiffs have further argued that the State taxes interfere with the Tribe's ability to control the scope and timing of development of its coal resources, and that such an interference is contrary to the protection accorded Indian tribes by *Williams v. Lee* and *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1976). The plaintiffs cite *Santa Rosa* for the proposition that

> . . . tribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life. Extension of local jurisdiction to the reservation would burden that development by increasing its cost. . . . But more critically, subjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control

> of the timing and scope of the development of reservation resources. . . . *Santa Rosa*, 532 F.2d at 664.

It must be borne in mind, however, in considering the impact of authority such as *Santa Rosa* upon resolution of the instant case that there is a distinct factual dissimilarity between the two cases. In *Santa Rosa*, an Indian tribe and two of its members brought an action for declaratory and injunctive relief to restrain enforcement of certain county ordinances. The district court granted the requested relief, and the county appealed. The Court of Appeals held that the county was without jurisdiction to enforce its zoning ordinances or building code on Indian reservation trust land, and that the courts must determine on a case-by-case basis when concrete disputes arise whether a county has jurisdiction to enforce any particular ordinance against Indian reservation or trust land. In so holding, the Court of Appeals stated:

> At the outset, we emphasize that this suit involves an attempt to regulate Indian use of Indian trust lands. We are clear, regardless of the modification worked in the exclusive Federal jurisdiction and tribal sovereignty doctrines of *Worcester v. Georgia*, 31 U.S. (6 Pet. 515) 350, 8 L.Ed. 483 (1832), by subsequent Court decisions such as *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) and *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), that in any event any concurrent jurisdiction the states might inherently have possessed to regulate Indian use of reservation lands has long ago been preempted by extensive Federal policy and legislation. *Santa Rosa*, 532 F.2d at 658.

The essential question addressed by the Court in *Santa Rosa* was one involving construction of Public Law 280, 28 U.S.C. § 1360, which vests in certain enumerated states civil jurisdiction over certain enumerated tribes. The Court of Appeals held, in essence, that Public Law 280 subjected Indian country only to the civil laws of the state and not to local (county) regulation. In so holding the Court stated that:

> From that perspective, we conclude that Congress did not contemplate immediate transfer to local governments of civil regulatory control over reservations. Prior to passage of P.L. 280, Congress had encouraged, under § 476 of the Indian Reorganization Act, the formation and exercise of tribal self-government on reservation trust lands. A construction of P.L. 280 conferring jurisdiction to local county and municipal governments would significantly undermine, if not destroy, such tribal self-government. By transferring regulation of all matters of local concern to local governments, the tribal government would be left little or no scope to operate. We think it more plausible that Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state, empowered, subject to the paramount provisions of state law, to regulate matters of local concern within the area of its jurisdiction. *Santa Rosa*, 532 F.2d at 662-663.

It must be borne in mind in considering the holding of *Santa Rosa* that the local governmental controls being attacked in the case were zoning controls imposed by the defendant, Kings County. It must also be borne in mind

that the reservation had, by virtue of Public Law 280, already been totally subjected to the jurisdiction of the *State* of California. The distinction between *Santa Rosa* and the instant case is obvious; the contrast of local governmental zoning control over Indian housing on Indian trust land to state taxation of a non-Indian enterprise on land that has been ceded by the Crow Tribe to the United States reveals that on the facts alone, *Santa Rosa* is inapplicable in this case. As a matter of law, the remote economic effect to the Tribe of Montana's taxation of Westmoreland's production and income arising out of operation under tribal coal leases – economic effect which is so remote as to have thus far evaded definition – is insufficient to constitute an interference with Crow tribal self-government.

C. *Preemption.*

Intertwined with their argument that the taxes in issue impermissibly interfere with tribal self-government is plaintiffs' claim that the State taxes have been preempted by the Crow tribal coal tax. In so arguing they allege that the Montana taxes conflict with the taxes imposed by the Tribe, serving to reduce the amount of revenue the Tribe is able to receive as a result of Westmoreland's production. The Montana taxes, the plaintiffs argue, run afoul of the holding in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 691, 85 S.Ct. 1242, 1246, 14 L.Ed.2d 165 (1965), wherein it was stated that a

> . . . state tax on gross income would put financial burdens on [the non-Indian trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and

> could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians. . . .

However, the question of preemption raised by the plaintiffs in this case is quite different from the question addressed by the Court in *Warren Trading Post*. In that case the appellant, an operator of a retail trading post on the Navajo Indian Reservation, under a license granted by the Commissioner of Indian Affairs pursuant to 25 U.S.C. § 261, challenged the right of Arizona to levy a tax on his income from trading with reservation Indians on the Reservation. The Supreme Court, in invalidating Arizona's tax, held that since Congress had broadly occupied the field of trading with Indians on reservations by all-inclusive regulations and statutes, the states may not permissibly impose additional burdens on the traders or the Indians. In speaking about the federal regulatory framework by which Indian traders are governed, the Court said:

> [T]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders. *Warren Trading Post*, 380 U.S. at 690, 85 S.Ct. at 1245.

In the instant case, however, there is no body of federal law either governing the method by which coal underlying reservation lands is to be taxed or immunizing non-Indian lessees from the application of state law. A Ninth Circuit case, *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), is instructive

upon the application of the doctrine of preemption to taxation of non-Indian lessees of Indian trust land. In that case, appeal was taken from the judgment of the United States District Court for the Central District of California, upholding a possessory interest tax imposed by the defendant County on non-Indian lessees of land held in trust for the Fort Mojave Indian Tribe. The Court of Appeals held that imposition of possessory interest taxes on non-Indian lessees did not violate the Indian Reorganization Act, and was not invalid as being an infringement upon the Tribe's right to govern itself. Further, it was held that imposition of possessory interest taxes by both the Fort Mojave Indian Tribe and San Bernardino County on non-Indian lessees of Indian land did not result in improper double taxation. The essence of the *Fort Mojave* decision was that the concept of Indian sovereignty is no longer the proper major focus of analysis in taxing situations. Rather, the inquiry is one involving analysis of the applicable federal statutes to determine whether state action has been preempted. If not, the state statute need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1958), which is that it not infringe on the rights of reservation Indians to make their own laws and be governed by them. Federal statutes clearly have not preempted the area of a state's taxation of coal produced within its exterior boundaries, even if that coal lies under Indian Reservation lands. The Mineral Leasing Act, as well as the other federal statutes governing lease by the Crow Tribe of the coal estate in question, is silent as to taxation. The Tribe is not, of course, prevented from enacting taxing measures of their own, which, to a certain degree, has already been done.

Should the Tribe do so, however, the mere enactment of a tribal taxing statute would not preempt the state statute taxing the same subject matter. As was stated by the Court in *Fort Mojave*, in considering the problem of taxation of the same subject matter by both the County and the Tribe:

> The assertion that "double taxation," resulting from the imposition of a tax both by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. We hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right of self-government. *Fort Mojave*, 543 F.2d at 1258.

Most persuasive on the issue of preemption, however, is a close analysis of the present effect of the Crow Tribe's coal tax. As the plaintiffs have indicated in their memoranda to the Court, the Tribe has adopted and approved a coal severance tax upon coal produced from beneath the Reservation trust lands. No gross proceeds tax has been enacted by the Tribe. At present, the only mining being done is that of coal underlying the ceded strip. By the plaintiffs' own admission the tribal taxing statutes do not affect mining in the ceded area. The simple fact is that the Crow Tribe, although possessing a certain measure of taxing power, has as yet taxed no one, and no one has as yet been taxed by both the tribe and

the State upon production of or proceeds from coal. It is therefore apparent that plaintiffs' claim that the Montana taxing statutes here in issue have been preempted by federal statutes as well as the Crow Tribal coal tax is without merit.

D. *Enabling Act and Constitutional Claims.*

Section 4 of the Enabling Act pursuant to which Montana was admitted to the Union provides:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. . . . Enabling Act of February 22, 1899, 25 Stat. 676.

The Constitution adopted and ratified by the people of Montana in 1889 pursuant to the Enabling Act recognized and accepted the limitation upon the State's power to tax. Ordinance No. I to the 1889 Constitution of the State of Montana provided:

> Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian tribes, and that

> until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. . . . Montana Constitution, Ord. I, 2 (1889).

The same disclaimer is expressly reaffirmed by and incorporated in Article I of the Montana Constitution of 1972.

Upon the basis of the disclaimer of jurisdiction appearing in both the Enabling Act and the Constitution, the plaintiffs contend that the State is without authority to enact, let alone assess the taxes contemplated by R.C.M., (1947) §§ 84-1312 through 84-1325. Plaintiffs' argument in this connection suffers the same failing, however, as did their argument that the taxes in issue lack congressional authority. Plaintiffs, in arguing that the Montana coal severance tax and Montana coal gross proceeds tax are violative of both the Constitution and Enabling Act of the State, are arguing from the position that the taxes are levied against either the Tribe or tribal trust land. That contention has previously been expressly rejected. Plainly, the taxes in issue are imposed upon the production and income of non-Indian coal mine operators. The taxes levied are levied upon personalty. In distinguishing between taxation of Indians or Indian realty and personalty found upon the reservation in the possession of a third party, the Ninth Circuit stated, in *Truscott v. Hurlbut Land and Cattle Co.*, 73 F. 60 (9th Cir. 1896):

> The people inhabiting the proposed state [of Montana] were required by congress to agree, and did agree, as one of the conditions to its admission into the Union, to disclaim any right

or title to all lands lying within the limits of the proposed state owned or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and under the absolute jurisdiction and control of congress. The people inhabiting the proposed state were required to make, and did make, as one of the conditions of its admission into the Union, a similar disclaimer in respect to all right and title to the unappropriated public lands lying within its boundaries. Those, too, remained in the absolute jurisdiction and control of congress for all purposes relating to their control or disposition. The state could not tax or incumber such unappropriated public lands, or otherwise interfere with the jurisdiction and control over them reserved by the United States, *but no one, we apprehend, would contend that personal property taken upon them by a third party, whether rightfully or wrongfully, would not be liable to be taxed in the state and county in which it should be found.* *Truscott*, 73 F. at 64 (emphasis added).

The *Truscott* Court went on further to say that:

> In reserving lands for the exclusive and undisturbed use of these Indians and for others who, with their consent and with that of the United States, should occupy them, it was not the intention of congress to establish an asylum into which persons other than the Indians, whether natural or artificial, can take their property, and hold it exempt from its just portion of the taxation necessary for the support of the government which gives it protection. *Truscott*, 73 F. at 65.

As the taxes in issue are assessed solely against Westmoreland, a non-Indian entity, and are in fact assessed solely against Westmoreland's personalty – severed coal and gross proceeds from coal – it is inconceivable that any infringement upon Indian rights has been worked, or that any abridgement of either the Enabling Act or the Montana Constitution has occurred. Montana has in no way exceeded its sovereign powers in either legislating or assessing the coal severance and gross proceeds from coal taxes. To strike down the taxes in issue would be to extend to Westmoreland an immunity from State law which is antithetical to both the letter and the trend of the law concerning State jurisdiction over Indian reservations. To work such a drastic alteration requires exercise of legislative, and not judicial, discretion. The result sought by plaintiffs is one that Congress, and not the Courts, must give them.

From the foregoing, it is evident that plaintiffs can prove no set of facts in support of any of their four enumerated claims which would entitle them to the requested relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). As plaintiffs' claims are without basis either in fact or in law, they are insufficient to survive the State of Montana's motion to dismiss. The motion to dismiss the second amended complaint for failure to state a claim is meritorious, and must be granted.

III. *Motion to Dismiss the Claims of the Individually Named Plaintiffs for Want of Subject Matter Jurisdiction*

By this motion the State seeks to dismiss the claims of the individually named plaintiffs, Horn, Hogan, Yellowtail,

and Old Coyote, for want of jurisdiction. The individually named plaintiffs have brought their claims pursuant to 28 U.S.C. §§ 1331 and 1343.

Section 1331 recites that:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

The Second Amended Complaint recites, in paragraph 1, that the amount in controversy exceeds, exclusive of interest and costs, $10,000. No allegation appears in the complaint that the amount in controversy as to each plaintiff exceeds the jurisdictional amount of $10,000. It is well settled that in an action in which jurisdiction is invoked pursuant to 28 U.S.C. § 1331, each plaintiff must not only allege but also be able to meet the jurisdictional amount requirement. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). It is essential that each of the individual plaintiffs properly plead the amount in controversy prior to this Court's recognizing its jurisdiction. The value of the matter in controversy must be measured not by the importance of the principle involved, but by the monetary value of the right sought to be gained. *Yoder v. Assiniboine & Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964). Here, the matter sought to be gained is immunity for lessees of the Tribe from the coal severance and coal gross proceeds taxes. The principal allegation as to value supporting the plaintiffs' claim is that the Tribe, and not the individual plaintiffs, would be in a better bargaining position for the negotiation of coal leases if

Montana were enjoined from imposing its taxes upon Crow tribal lessees. The monetary benefits sought here to be gained accrue solely to the Tribe; as such, any right or matter in controversy accruing to the individual plaintiffs is necessarily based upon a theory that each has a right to share in any benefits accruing to the Tribe. It is evident, however, that individual members of the Tribe cannot claim, as a matter of right, any specific portion of tribal benefits for themselves.

> In the absence of legislation to the contrary, the individual Indian has no right as against the tribe to any specific part of the tribal property. It is often said that the individual has only a "prospective right" to future income from tribal property in which he has no present interest. . . . Until the property loses its tribal character and becomes individualized, his right can be no more than this. . . . In the case of tribal funds, he has, ordinarily, no vested right in them until they have been paid over to him or have been set over to his credit. . . . *Felix Cohen, Handbook of Federal Indian Law*, 183-184 (1942).

It is evident that the individually named plaintiffs have no economic interest or matter in controversy sufficiently detached from the general economic injury alleged by the Tribe such that they are entitled to invoke this Court's federal question jurisdiction under § 1331. Further, as no specific allegations of amount in controversy appear as to each plaintiff, this Court is without subject matter jurisdiction over the claims of Horn, Hogan, Yellowtail, and Old Coyote under the provisions of 28 U.S.C. § 1343(3). That section provides that:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under the color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Jurisdiction under § 1343(3) does not turn upon satisfaction of a minimum amount-in-controversy requirement. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

The defendants argue that 28 U.S.C. § 1341 is a bar to this Court's jurisdiction under § 1343. Section 1341 states:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The plaintiffs have argued, and correctly so, citing *Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297 (D.Mont.1974), aff'd 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), that

> . . . the exception [from the bar of 1341] applies even where, as here, the United States is not a party plaintiff, if the suit could have been brought by the United States and is in fact brought by parties who could properly be co-plaintiffs with the United States. . . . *Moe*, 392 F.Supp. at 1302.

However, the only challenge to the Montana taxes offered by the individual plaintiffs is that the taxes constitute a violation of their civil rights. Although § 1341 does not bar the claims of the Tribe, *Moe, supra*, it bars jurisdiction even when the Court could have accepted jurisdiction pursuant to 42 U.S.C. § 1983 (civil rights violations), 28 U.S.C. §§ 1343 and 1331. *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973); *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033, 87 S.Ct. 1484, 18 L.Ed.2d 596 (1967). The individually named plaintiffs' complaint, as based upon a federal question or alleged violations of their civil rights, does not avoid the jurisdictional prohibition contained in 28 U.S.C. § 1341. *Hickmann v. Wujick*, 488 F.2d 875 (2nd Cir. 1973). It is evident that the State of Montana's motion to dismiss the claims of the individually named plaintiffs for want of subject matter jurisdiction is well taken.

On the basis of the foregoing,

IT IS ORDERED that the State of Montana's motion to dismiss the Second Amended Complaint for failure to state a claim upon which relief may be granted be, and the same hereby is, granted.

IT IS FURTHER ORDERED that the State of Montana's motion to dismiss the claims of the individually named plaintiffs, Horn, Hogan, Yellowtail, and Old Coyote, for want of subject matter jurisdiction be, and the same hereby is, granted.

The Clerk is directed to enter judgment by separate document in accordance with this memorandum opinion and order.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS, Plaintiff-Appellant, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, Defendants-Appellees.	)	No. 95-35093 D.C. No. CV-78-00110-BLG
THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor-Appellant, v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, Defendants-Appellees.	)	No. 95-35096 D.C. No. CV-78-00110-JDS ORDER (Filed Feb. 21, 1997)

Before: BROWNING, WRIGHT, and CANBY, Circuit Judges

The panel has voted to deny Appellee State of Montana's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). Judge Thomas recused himself.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

§ 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

§ 396b. Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by

private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title. to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by an Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title.

§ 396c. Lessees of restricted lands to furnish bonds for performance

On and after May 11, 1938, lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: *Provided*, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

§ 396d. Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted

Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

§ 396e. Officials authorized to approve leases

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

§ 396f. Lands excepted from leasing provisions

Sections 396a, 396b, 396c, and 396d of this title shall not apply to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

396g. Subsurface storage of oil or gas

The Secretary of the Interior, to avoid waste or to promote the conservation of natural resources or the welfare of the Indians, is authorized in his discretion to approve leases of lands that are subject to lease under section 396 or 396a of this title, or the subsurface storage of oil and gas, irrespective of the lands from which initially produced, and the Secretary is authorized, in order to provide for the subsurface storage of oil or gas, to approve modifications, amendments, or extensions of the oil and gas or other mining lease(s), if any, in effect as to restrict Indian lands, tribal or allotted, and may promulgate rules and regulations consistent with such leases, modifications, amendments, and extensions, relating to the storage of oil or gas thereunder. Any such leases may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for a royalty other than that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. It may be provided that any oil and gas lease under which storage of oil or gas is so authorized shall be continued in effect at least for the period of such storage use and so long thereafter as oil or gas not previously produced is produced in paying quantities.

CHAPTER NO. 525

AN ACT REVISING THE TAXATION OF COAL PRODUCTION; PROVIDING FOR A SEVERANCE TAX ON COAL PRODUCED AT A PERCENTAGE OF VALUE; DELETING COAL FROM THE PROVISIONS TAXING THE NET PROCEEDS OF MINES; PROVIDING FOR TAXATION OF THE GROSS PROCEEDS FROM COAL AS AN ELEMENT IN THE PROPERTY TAX SYSTEM; PROVIDING FOR CERTAIN ROYALTIES; AMENDING SECTIONS 84-301, 84-302, 84-1309.1, AND 84-5402; AND REPEALING SECTIONS 84-1301 THROUGH 84-1309, 84-1310, AND 84-1311, R.C.M. 1947.

Be it enacted by the Legislature of the State of Montana:

Section 1. There is a new R.C.M. section numbered 84-1312 that reads as follows:

84-1312. Legislative findings and declarations of purpose. (1) The legislature finds that while coal is extracted from the earth like metal minerals, there are differences between coal and metal minerals such that they should be classified in different categories for taxation purposes. The legislature finds that while coal can be utilized like petroleum products, there are differences between coal and petroleum such that they should be classified in different categories for taxation purposes. The legislature further finds that:

(a) coal is the only mineral which can supply energy while being easily found in abundance in Montana;

(b) coal is the only mineral which is so often marketed through sales contracts of many years' duration;

(c) coal, unlike most minerals, varies widely in composition and consequent value when marketed;

(d) coal in Montana is subject to regional and national demands for development which could affect the economy and environment of a larger portion of the state than any other mineral development has done;

(e) coal in Montana, when sub-bituminous and recoverable by strip mining, is in sufficient demand that at least one-third (1/3) of the price it commands at the mine may go to the economic rents of royalties and production taxes;

(f) coal in the lignite form is in less demand and producers of lignite are able to pay lesser amounts of royalty and production tax than producers of sub-bituminous can pay;

(g) coal produced in underground mines has higher production costs and underground producers are able to pay lesser amounts of royalty and production tax than strip-mine producers can pay;

(h) coal production in Montana has been subject to an uncoordinated array of taxes which overlap one another and yield revenue in an inconsistent and unpredictable manner.

(2) The legislature declares that the purposes of this chapter are:

(a) to allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) to stabilize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) to simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections; and

(d) to accomplish the foregoing purposes by establishing categories of taxation which recognize the unique character of coal as well as the variations found within the coal industry.

Section 2. There is a new R.C.M. section numbered 84-1313 that reads as follows:

84-1313. Definitions. As used in this chapter: (1) "Contract sales price" means either (a) the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or (b) a price imputed by the department under section 84-1318.

(2) "Energy conversion process" includes any process by which coal in the solid state is transformed into slurry, gas, electric energy, or any other form of energy.

(3) "Produced" means severed from the earth.

(4) "Strip mining" or "surface mining" is defined in section 50-1036.

(5) "Underground mining" means a coal mining method utilizing shafts and tunnels, and not regulated under section 50-1039.

(6) "Ton" means two thousand (2,000) pounds.

(7) "Department" means the department of revenue.

(8) "Taxes paid on production" include any tax paid to the federal, state, or local governments upon the quantity of coal produced as a function of either the volume or the value of production, and do not include any tax upon the value of mining equipment, machinery, or buildings and lands, any tax upon a person's net income derived in whole or in part from the sale of coal, or any license fee.

Section 3. There is a new R.C.M. section numbered 84-1314 that reads as follows:

84-1314. Severance tax – rates imposed – exemptions. A severance tax is imposed on each ton of coal produced in the state, in accordance with the following schedule:

Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule. "Value" means the contract sales price. A person is not liable for any severance tax upon the first five thousand (5,000) tons of coal he produces in a quarter-year.

Section 4. There is a new R.C.M. section numbered 84-1315 that reads as follows:

84-1315. Quarterly statement and payment of tax. Each coal mine operator shall compute the severance tax due on each quarter-year's worth of production on forms prescribed by the department. The statement shall indicate the tonnage produced, the average Btu value of the production, the contract sales price received for the production, and such other information as the department may require. The complete form in duplicate, with the tax payment, shall be delivered to the department not later than thirty (30) days following the close of the quarter. The form shall be verified by an officer of the coal mine operator. A person operating more than one coal mine in this state may include all of his mines in one statement. The department may grant a reasonable extension of time for filing statements and payments of taxes due upon good cause shown therefore.

Section 5. There is a new R.C.M. section numbered 84-1316 that reads as follows:

84-1316. Penalty for delinquent tax. The department shall add to the amount of all delinquent severance taxes a penalty of ten percent (10%) of the delinquent amount plus interest at the rate of one percent (1%) per month or fraction thereof computed on the total amount of severance tax and penalty. Interest shall be computed from the date the severance tax was due to the date of payment. The department shall mail to the person required to file a quarterly report and pay any severance tax, a letter setting forth the amount of tax, penalty and interest due, and the letter shall further contain a statement that if

payment is not made within fifteen (15) days a lien may be filed as set forth in section 84-1323. The penalty amount may be waived by the department if reasonable cause for the failure or neglect to file the quarterly statement is provided to the department.

Section 6. There is a new R.C.M. section numbered 84-1317 that reads as follows:

84-1317. Annual testing of samples. The Montana state bureau of mines and geology shall test coal production subject to this chapter and may make rules governing the collection of test data. A person subject to this chapter shall submit to the bureau on or before August 1 each year a sample of mine run "as is" coal from each mine producing that year. Additional samples shall be submitted at the request of the bureau. The bureau shall compute the Btu per pound of each sample received and forward this information to the department prior to September 1 each year.

Section 7. There is a new R.C.M. section numbered 84-1318 that reads as follows:

§ 84-1318. When value of coal may be imputed – procedure. In a case where

(a) the operator of a coal mine is using the produced coal in an energy conversion or other manufacturing process, or

(b) a person sells coal under a contract which is not an arm's-length agreement, or

(c) a person neglects or refuses to file a statement and tax return under this chapter, the department may impute a value to the coal which approximates market

value f.o.b. mine. When imputing value, the department may apply the factors used by the federal government under 26 U.S.C. section 613, or that provision as it may be labelled or amended, in determining gross income from mining, or the department may apply any other or additional criteria it considers appropriate. Each subject taxpayer shall, upon request by the department, furnish a copy of its federal income tax return, with any amendments, filed for the year in which the value of coal is being imputed and copies of the contracts under which it is selling coal at the time. When the department's estimate of market value is contested in any proceeding, the burden of proof is on the contesting party.

Section 8. Section 84-1309.1, R.C.M. 1947, is renumbered 84-1319, and is amended to read as follows:

"84-1319. Disposal of license or severance taxes. License *or severance* taxes collected under the provisions of this chapter *or such sections as may enact a severance tax on coal in 1975* are allocated as follows:

(1) To the county *for such purposes as the governing body of that county may determine* from which coal was mined *for each calendar year prior to January 1, 1980,* three cents (3¢) per ton *or four percent (4%) of the severance tax paid on the coal mined in that county, whichever is higher and for each calendar year following December 31, 1979, this amount shall be three cents (3¢) per ton or three and one-half percent (3½%) of the severance tax on the coal mined in that county, whichever is higher.*

(2) To the earmarked revenue fund, such portions of the severance tax as may be authorized by laws enacted in 1975.

(3) All other revenues from license *or severance* taxes collected under the provisions of this chapter shall be deposited to the credit of the general fund of the state."

Section 9. There is a new R.C.M. section numbered 84-1320 that reads as follows:

84-1320. Reporting gross proceeds from coal. Each person engaged in mining coal must, on or before March 31 each year file with the department a statement of the gross yield from each coal mine owned or worked by such person in the preceding calendar year, and the value thereof. The statement shall be in the form prescribed by the department of revenue, which may be coordinated with the form used under section 84-1316, and must be verified by an officer of the firm. The statement shall include:

(1) The name and address of the owner or lessee or operator of the mine.

(2) The location of the mine.

(3) The tons of ore extracted, treated, and sold from the mine during the taxable period.

(4) The gross yield or value in dollars and cents derived from the contract sales price.

Section 10. There is a new R.C.M. section numbered 84-1321 that reads as follows:

84-1321. Transmission of gross proceeds from coal to county assessor. On or before July 1 each year the department shall transmit to the county assessor of each county in which coal mines are situated, the valuation of the gross proceeds of such mines for the purpose of

taxation, as the same have been determined by the department. The county assessor shall immediately enter the same upon a suitable assessment roll, the form of which shall be prescribed by the department.

Section 11. There is a new R.C.M. section numbered 84-1322 that reads as follows:

84-1322. Taxation of gross proceeds from coal. The county assessor shall prepare from the reported gross proceeds from coal a tax roll, which he shall transmit to the county treasurer on or before September 15 each year. The county treasurer shall proceed to give full notice thereof to each coal producer and to collect the taxes due within sixty (60) days after mailing.

Section 12. There is a new R.C.M. section numbered 84-1323 that reads as follows:

84-1323. Lien of tax – enforcement of payment. The tax on gross proceeds from coal shall be levied as taxes on other forms of property, and this tax and the severance tax on coal production are each a lien upon the coal mine and a prior lien upon all personal property and improvements used to produce the coal. These taxes may be collected by the seizure and sale of the personal property on which the tax is a lien, as provided under sections 84-4202 through 84-4211, or by suit under sections 84-4301 through 84-4302.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. STATE OF MONTANA; DENIS ADAMS, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; Lorraine Hamilton, Treasurer, Big Horn County, Montana, Defendants, WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	No. CV-78-110-BLG PLAINTIFF-INTERVENOR'S FIRST AMENDED COMPLAINT

JURISDICTION

1. Comes now the Attorney General at the request of the Secretary of the Interior and alleges as follows. Plaintiff-Intervenor, United States, in this first amended complaint seeks restitution and equitable relief. Plaintiff-Intervenor's claims arise under Article I, Section 8, Clause 3, the Indian Commence Clause, and Article VI, Clause 2, the Supremacy Clause, of the Constitution of the United States; under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq;* and under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1108. This Court has jurisdiction under 28 U.S.C. § 1345.

PARTIES

2. Plaintiff-Intervenor, the UNITED STATES, is the trustee of the coal which is the subject of this lawsuit on behalf of the Crow Tribe. Further, the United States is entitled to hold in trust all tax proceeds on the coal held in trust by the United States.

3. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by the Secretary of the Interior.

4. Defendant STATE OF MONTANA (hereinafter "State" or "Montana") is a State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

5. Defendant DENIS ADAMS is Director of the Montana Department of Revenue. He is sued in his official capacity; his official address is: Department of Revenue, Sam W. Mitchell Building, Rm. 455, Helena, Montana 59620.

6. Defendant BIG HORN COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Big Horn County.

7. Defendant LORRAINE HAMILTON is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Drawer H, Hardin, Montana 59034.

FACTUAL ALLEGATIONS

8. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying the Crow Reservation and an area known as the "ceded area" that was opened to allotment and settlement by non-Indians pursuant to the Act of April 17, 1904, 33 Stat. 352. The coal underlying the ceded strip is a component part of the reservation. The United States manages and supervises the Tribe's trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

9. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale of prospecting permits covering Crow coal underlying 34,671 acres in the ceded area. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. One of the leases, which

encompassed approximately 16,130 acres, was subsequently terminated by mutual consent of the Tribe and Westmoreland with the approval of the Department of the Interior. Westmoreland is the only lessee currently mining Crow coal. The existing lease was amended by agreement dated July 10, 1982, which was approved by the BIA on September 29, 1982.

10. On May 8, 1980, the Tribe entered into a lease with the Shell Oil Company embracing Crow coal underlying approximately 2,560 acres within the Crow Indian Reservation. This agreement also included various options for mining Crow coal underlying additional acreage within the Crow Reservation. This lease was relinquished by Shell because it could not find buyers at the price it would have to charge with Montana's coal taxes included.

11. In 1975, the State enacted statutes which imposed on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal produced in the State. Montana Code Annotated §§ 15-35-101 through 15-35-111, 15-23-701 through 15-23-704.

12. Defendants Denis Adams and Lorraine Hamilton are the state and county officials charged by Montana law with the enforcement and collection of the Montana coal severance and gross proceeds taxes.

13. Between 1975 and 1983, Westmoreland paid more than $54,000,000 in severance taxes to Montana on the production of coal mined under the Crow lease.

14. Between 1975 and 1988, Westmoreland paid more than $11,000,000 in gross proceeds taxes to the Defendant Big Horn County based upon production and sale of coal mined from the Crow lease.

15. Severance taxes after January 1, 1983 pursuant to Court order were paid into the Court Registry. Gross proceeds taxes after November 25, 1987, pursuant to Court order were paid into the Court registry. The Montana coal taxes are invalid, having been preempted by Federal law, and are void because they interfere with tribal self government. Accordingly, in May, 1989, this Court paid over approximately $30,000,000 from the Court Registry to the United States in trust for the Crow Tribe.

16. There are approximately 8,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Indian Reservation. The Crow people retain a significant degree of tribal culture, maintaining the Crow language and Crow tribal ceremonies and customs. To date, the Crow people have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status. Coal is the principal asset of the Crow Tribe from which funds can be derived to provide for economic development.

17. The Crow Tribe and its members are severely impoverished. The Tribe does not have sufficient revenues to provide adequate services. The unemployment rate among tribal members is much higher than among

the non-Indian populations of Montana and adjacent states.

18. In 1976 the Crow Tribe enacted a severance tax on coal mined on the Crow Reservation. Coal underlying the ceded strip is a component of the Reservation, and the Tribal severance taxes were at all times valid as to the coal mined from the ceded strip. In 1982 the Tribe and Westmoreland entered into an amended lease pursuant to which Westmoreland agreed to pay to the Tribe a tax equal to the Montana coal taxes less whatever amounts Westmoreland was required to pay Montana.

19. The rate of Montana's coal severance tax was so high that assessment and collection of the severance tax and the gross proceeds tax resulted in appropriation of substantially all of the economic rent and value of the Tribe's coal. The Montana coal taxes: (a) made Crow coal less competitive; (b) reduced the amount of Crow coal which would have been mined; (c) prevented and limited the Tribe from entering into other coal leases and the production of leased coal; (d) prevented collection of Tribal coal taxes; (e) reduced royalty payments to the Crow Tribe; (f) prevented the economic development of the Crow Reservation; (g) reduced the ability of the Tribe to renegotiate its leases with Westmoreland and others; (h) reduced or eliminated the ability of the Tribe to enter into arrangements for the mining and sale of Crow coal; (i) prevented the Tribal government from providing essential governmental services; (j) and interfered with the Tribe's sovereign right to govern its reservation.

20. Prior to and since the enactment of the Montana coal tax laws Crow Tribal representatives have consistently asserted the invalidity and protested the imposition of the Montana taxes as applied to Crow coal.

FIRST CAUSE OF ACTION IN ASSUMPSIT FOR MONEY HAD AND RECEIVED

Plaintiff-Intervenor repeats and realleges by reference the allegations set forth in paragraphs 1 through 20.

21. Montana and the Defendant Big Horn County, between 1975 and 1983 as to severance taxes and 1975 and 1988 as to gross proceeds taxes, collected taxes on coal produced from the Crow Tribe's Reservation in the approximate amount of $65,000,000.00 The statutes purporting to sanction collection of the taxes were void and the monies were illegally collected. The Tribe was entitled to receive such funds as owner of the coal and pursuant to valid Tribal coal taxes and contracts.

22. The Crow coal production was substantially the only source of funds for the maintenance and economic development of the Crow Tribe. Montana had many sources of revenue and established a trust fund into which a portion of the taxes collected were paid.

23. If defendants are allowed to keep the funds collected as taxes, they would be unjustly enriched. Defendants have no legal or equitable right to retain the monies illegally collected. In equity and good conscience such monies belong to the United States to be held in trust for the Tribe, and in equity and justice such monies should be paid over to the United States to be held in

trust for the Tribe by defendants, together with interest thereon.

SECOND CAUSE OF ACTION

Plaintiff-Intervenor repeats and realleges by reference the allegations set forth in paragraphs 1 through 23.

24. The monies received by Defendant Montana and the Defendant Counties were illegally collected under void statutes. It would be unjust and inequitable to allow defendants to retain such monies; defendants have no right, legal or equitable, to such monies. The United States on behalf of the Crow Tribe as owner of the coal and by reason of the Tribe's valid tax ordinances and statutes and the amended lease agreement is legally and equitably entitled to such monies together with interest thereon from the dates collected. Unless such monies are awarded to the United States to be held on behalf of the Tribe, defendants will be unjustly enriched. A constructive trust in favor of the Tribe should be imposed on all monies collected, together with interest thereon until such monies are paid over to the United States to be held in trust for the Tribe.

WHEREFORE, Plaintiff-Intervenor prays for the following relief:

1. A judgment awarding the United States on behalf of the Crow Tribe an amount equal to all severance and gross proceeds taxes that have been paid to the Defendants Montana and Big Horn County between 1975 and 1982 as to severance taxes and between 1975 and 1988 as

to gross proceeds taxes on production of Crow coal, together with interest thereon from the dates paid.

2. For a judgment declaring a constructive trust in favor of the United States on behalf of the Crow Tribe on all monies paid as taxes on the production of Crow coal from 1975 through 1983 as to severance taxes and from 1975 through 1988 as to gross proceeds taxes together with interest thereon until such sums are paid over to the United States on behalf of the Crow Tribe.

3. A judgment awarding the United States its costs of suit, expert witness fees, and attorneys fees.

4. For such additional relief as the Court may deem just and equitable.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. STATE OF MONTANA; KEN NORDTVEDT, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; Lorraine Hamilton, Treasurer, Big Horn County, Montana, Defendants, WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	)	No. CV-78-110-BLG FOURTH AMENDED COMPLAINT FOR RESTITUTION

Plaintiff CROW TRIBE OF INDIANS alleges:

JURISDICTION

1. Plaintiff Crow Tribe seeks restitution and equitable relief. Plaintiff's claims' arise under Article I, Section 8, Clause 3 and Article VI of the Constitution of the United States; under the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a et seq; and under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1108. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1362.

PARTIES

2. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior.

3. Defendant STATE OF MONTANA (hereinafter "State" or "Montana") is a State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

4. Defendant Ken Nordtvedt is Director of the Montana Department of Revenue. He is sued in his official capacity; his official address is: Department of Revenue, Sam W. Mitchell Building, Rm. 455, Helena, Montana 59620.

5. Defendant BIG HORN COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Big Horn County.

6. Defendant Lorraine Hamilton is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Drawer H, Hardin, Montana 59034.

7. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying the Crow Reservation and an area known as the "ceded area" that was opened to allotment and settlement by non-Indians pursuant to the Act of April 17, 1904, 33 Stat. 352. The coal underlying the ceded strip is a component part of the reservation. The United States manages and supervises the Tribe's trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

8. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale or prospecting permits covering Crow coal underlying 34,671 acres in the ceded area. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. One of the leases, which encompassed approximately 16,130 acres, was subsequently terminated by mutual consent of the Tribe and Westmoreland with the approval of the Department of the Interior. Westmoreland is the only lessee currently mining Crow coal. The existing lease was amended by agreement dated July 10, 1982, which was approved by the BIA on September 29, 1982.

9. On May 8, 1980, the Tribe entered into a lease with the Shell Oil Company embracing Crow coal underlying approximately 2,560 acres within the Crow Indian Reservation. This agreement also included various options for mining Crow coal underlying additional acreage within the Crow Reservation. This lease was relinquished by Shell because it could not find buyers at the price it would have to charge with Montana's coal taxes included.

10. In 1975, the State enacted statutes which imposed on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal produced in the State. Montana Code Annotated §§ 15-35-101 through 15-35-111, 15-23-701 through 15-23-704.

11. Defendants Ken Nordtvedt and Lorraine Hamilton are the state and county officials charged by Montana law with the enforcement and collection of the Montana coal severance and gross proceeds taxes.

12. Between 1975 and 1983, Westmoreland paid more than $54,000,000 in severance taxes to Montana on the production of coal mined under the Crow lease.

13. Between 1975 and 1988, Westmoreland paid more than $11,000,000 in gross proceeds taxes to the Defendant Big Horn County based upon production and sale of coal mined from the Crow lease.

14. Severance taxes after January 1, 1983 pursuant to Court order were paid into the Court Registry. Gross proceeds taxes after November 25, 1987, pursuant to

Court order were paid into the Court registry. The Montana coal taxes are invalid having been preempted by Federal law and are void because they interfere with tribal self government. Accordingly, in May, 1989, this Court paid over approximately $30,000,000 from the Court Registry to the United States in trust for the Crow Tribe.

15. There are approximately 8,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Indian Reservation. The Crow people retain a significant degree of tribal culture, maintaining the Crow language and Crow tribal ceremonies and customs. To date, the Crow people have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status. Coal is the principal asset of the Crow Tribe from which funds can be derived to provide for economic development.

16. The Crow Tribe and its members are severely impoverished. The Tribe does not have sufficient revenues to provide adequate services. The unemployment rate among tribal members is much higher than among the non-Indian populations of Montana and adjacent states.

17. In 1976 the Crow Tribe enacted a severance tax on coal mined on the Crow Reservation. Coal underlying the ceded strip is a component of the Reservation, and the Tribal severance taxes were at all times valid as to the coal mined from the ceded strip. In 1982 the Tribe and

Westmoreland entered into an amended lease pursuant to which Westmoreland agreed to pay to the Tribe a tax equal to the Montana coal taxes less whatever amounts Westmoreland was required to pay Montana.

18. The rate of Montana's coal severance tax was so high that assessment and collection of the severance tax and the gross proceeds tax resulted in appropriation of substantially all of the economic rent and value of the Tribe's coal. The Montana coal taxes: (a) made Crow coal less competitive; (b) reduced the amount of Crow coal which would have been mined; (c) prevented and limited the Tribe from entering into other coal leases and the production of leased coal; (d) prevented collection of Tribal coal taxes; (e) reduced royalty payments to the Crow Tribe; (f) prevented the economic development of the Crow Reservation; (g) reduced the ability of the Tribe to renegotiate its leases with Westmoreland and others; (h) reduced or eliminated the ability of the Tribe to enter into arrangements for the mining and sale of Crow coal; (i) prevented the Tribal government from providing essential governmental services; (j) and interfered with the Tribe's sovereign right to govern its reservation.

19. Prior to and since the enactment of the Montana coal tax laws Crow Tribal representatives have consistently asserted the invalidity and protested the imposition of the Montana taxes as applied to Crow coal.

FIRST CAUSE OF ACTION IN ASSUMPSIT FOR MONEY HAD AND RECEIVED

Plaintiff repeats and realleges by reference the allegations set forth in paragraphs 1 through 19.

20. Montana and the Defendant Big Horn County, between 1975 and 1983 as to severance taxes and 1975 and 1988 as to gross proceeds taxes, collected taxes on coal produced from the Crow Tribe's Reservation in the approximate amount of $60,000,000. The statutes purporting to sanction collection of the taxes were void and the monies were illegally collected. The Tribe was entitled to receive such funds as owner of the coal and pursuant to valid Tribal coal taxes and contracts.

21. The Crow coal production was substantially the only source of funds for the maintenance and economic development of the Crow Tribe. Montana had many sources of revenue and established a trust fund into which a portion of the taxes collected were paid.

22. If defendants are allowed to keep the funds collected as taxes, they would be unjustly enriched. Defendants have no legal or equitable right to retain the monies illegally collected. In equity and good conscience such monies belong to the Tribe, and in equity and justice such monies should be paid over to the Tribe by defendants, together with interest thereon.

SECOND CAUSE OF ACTION

Plaintiff repeats and realleges by reference the allegations set forth in paragraphs 1 through 22.

23. The monies received by Defendant Montana and the Defendant Counties were illegally collected under void statutes. It would be unjust and inequitable to allow defendants to retain such monies; defendants have no right, legal or equitable, to such monies. The Crow Tribe

as owner of the coal and by reason of its valid tax ordinances and statutes and the amended lease agreement is legally and equitably entitled to such monies together with interest thereon from the dates collected. Unless such monies are awarded to the Tribe, defendants will be unjustly enriched. A constructive trust in favor of the Tribe should be imposed on all monies collected, together with interest thereon until such monies are paid over to the Tribe.

WHEREFORE, Plaintiff prays for the following relief:

1. A judgment awarding the Crow Tribe an amount equal to all severance and gross proceeds taxes that have been paid to the Defendants Montana and Big Horn County between 1975 and 1982 as to severance taxes and between 1975 and 1988 as to gross proceeds taxes on production of Crow coal, together with interest thereon from the dates paid.

2. For a judgment declaring a constructive trust in favor of the Crow Tribe on all monies paid as taxes on the production of Crow coal from 1975 through 1983 as to severance taxes and from 1975 through 1988 as to gross proceeds taxes together with interest thereon until such sums are paid over to the Tribe.

3. A judgment awarding the Crow Tribe its costs of suit, expert witness fees, and attorneys fees.

4. For such additional relief as the Court may deem just and equitable.

Respectfully submitted:

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(2)

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1996

STATE OF MONTANA, ET AL.,

Petitioners,

v.

CROW TRIBE OF INDIANS,
and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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July 1997

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QUESTION PRESENTED

Whether the State of Montana and Big Horn County should be required to pay the Crow Tribe, or the United States on its behalf, the 30% taxes they illegally imposed and collected on coal produced from deposits beneficially owned by the Tribe and paid to the State and County by the Tribe's lessee where the taxes were found to appropriate the Tribe's mineral wealth to deprive the Tribe of revenues it otherwise would have received, to impose substantial burdens on the Tribe, to violate the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, and to interfere with the Tribe's sovereignty.

PARTIES

All of the parties are listed in the caption of the petition.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals that is the subject of this appeal is reported at 92 F.3d 826 and 98 F.3d 1194 (1996) (*"Crow IV"*) and is reproduced in the Appendix to the Petition (Pet. App.) commencing at 1. Prior decisions in this matter by the Ninth Circuit are reported at 650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982) (*"Crow I"*), *cert denied*, 459 U.S. 916 (1982), reproduced in the Pet. App. commencing at 167 and 169; at 819 F.2d 895 (1987) (*"Crow II"*), reproduced in the Pet. App. commencing at 88; and at 969 F.2d 848 (1992) (*"Crow III"*), reproduced in the Pet. App. commencing at 58. This Court's prior summary affirmance of the Court of Appeals' 1987 decision in *Crow II* is reported at 484 U.S. 997 (1988), reproduced in the Pet. App. at 87.

The opinion of the District Court in *Crow IV* is unreported and is reproduced in the Pet. App. commencing at 17. The prior reported opinion of the District Court, which was the subject of review by the Court of Appeals in *Crow I*, appears at 469 F.Supp. 154 (D. Mont. 1979), and is reproduced in the Pet. App. commencing at 197. The District Court's prior reported opinion reviewed in *Crow II* appears at 657 F.Supp. 573 (D. Mont. 1985), and is reproduced in the Pet. App. commencing at 110. An unreported opinion of the District Court reviewed by the Court of Appeals in *Crow III* is reproduced in the Pet. App. commencing at 67.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1996. The petition for rehearing of the State of Montana and the other petitioners (Montana) was denied on February 21, 1997. Pet. App. 228. The petition for a writ of certiorari was docketed on May 16, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

In *Crow II*, the Court of Appeals for the Ninth Circuit held that Montana's severance and gross proceeds taxes on coal produced from the Tribe's coal deposits impermissibly infringed on the Crow Tribe's sovereignty and interfered with the policy of promoting tribal self-government and economic development underlying the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, were not narrowly tailored to achieve Montana's legitimate interest, and therefore were preempted by federal law. 819 F.2d 895, Pet. App. 88. See *Crow IV*, 92 F.3d at 828, Pet. App. 6 (summarizing the holding of *Crow II*). This Court summarily affirmed without opinion. 484 U.S. 997 (1988), Pet. App. 87.[1] The issue presented in the petition,

[1] In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 & n.17 (1989), this Court distinguished Montana's "unique" and "extraordinarily high" coal taxes which imposed a "substantial burden" on the Crow Tribe from the state oil and gas taxes there at issue, upheld the validity of those state oil and gas taxes as applied to tribal minerals, and declined to reexamine its summary affirmance in *Crow II*.

whether Montana and Big Horn County should be allowed to keep the taxes they illegally collected on the Tribe's coal from the Tribe's lessee at the Tribe's expense, arises from that holding.

The provisions of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, are reproduced in the Appendix to the Crow Tribe's Conditional Cross-Petition.

STATEMENT OF THE CASE

A. Factual Background

In 1972, the Crow Tribe (Tribe) and Westmoreland Resources (Westmoreland) entered into a coal lease pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S. §§ 396a *et seq*. In 1974, the Tribe and Westmoreland successfully renegotiated the terms of their lease. The lease and the amended lease were approved by the Department of the Interior. Production at the Westmoreland mine, which is located in an area known as the "ceded strip" located north of the exterior surface boundaries of the Crow Reservation, commenced in 1974. Pet. App. 30.

In April 1975, Montana enacted statutes imposing severance and gross proceeds taxes on coal produced within the State. There were no exceptions for coal owned by Indian tribes. Mont. Code Ann. §§ 15-35-101 to 111, 15-23-701 to 704. The severance tax rate charged on Crow coal produced during the 1975-1982 period at issue in the instant case was 30% of the value of the contract sales price of the coal. Pet. App. 25. The rate of the gross proceeds tax is equivalent to the number of mills levied

for general property tax by the county in which the production occurred. The amount of the gross proceeds tax on Crow coal varied somewhat from year to year but was generally in the range of approximately 5% of the contract sales price. Pet. App. 25-26. The effective rate of the combined severance and gross proceeds tax exceeded 32% of the coal's contract sales price taking account of allowable deductions and adjustments. *Crow II*, 819 F.2d at 899 n.2, Pet. App. 98; *Cotton Petroleum*, 490 U.S. at 186 n.17.

Tribal representatives appeared before the Montana legislature and strongly opposed the imposition of the proposed severance and gross proceeds taxes on Crow coal on the grounds that:

> (1) they are so out of line with taxes imposed by other neighboring states that Crow coal will no longer be competitive and therefore our coal development program will suffer, and (2) . . . the taxes bear no relation to the responsibilities and burdens which coal development has imposed on the State of Montana . . . [and 3] . . . this level of taxation is so high that [it] becomes an unauthorized state interference with federally secured Indian property.

ER 1.[2] The Tribe proposed a compromise to the legislature under which producers would receive a credit against state taxes for coal taxes paid to Indian tribes. The Senate Taxation Committee rejected the Tribe's proposal, commenting that "there would have to be court decreed

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[2] "ER" refers to the Tribe's excerpts of record filed with the Court of Appeals for the Ninth Circuit in *Crow IV*.

settlements regarding Indian coal revenues." ER 5. *See Crow IV*, 92 F.3d at 829, Pet. App. 9; Pet. App. 23.

In enacting the coal taxes, the Montana legislature found that strip-mined coal is in sufficient demand that:

> [A]t least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes. . . .

Mont. Code Ann. § 15-35-101(1)(e). In *Crow I*, 650 F.2d at 1113, Pet. App. 185, the Court of Appeals quoted this legislative finding and stated: "[b]y setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the economic rent."[3] *See also, Crow II*, 819 F.2d at 902, Pet. App. 104-05; *Crow IV*, 92 F.3d at 829, Pet. App. 10 ("we had . . . found [in *Crow I*] the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal . . . ").

The Tribe enacted its own 25% severance tax in early 1976. The tribal tax was approved by the Interior Department as applied to the coal within the exterior surface boundaries of the Reservation but not as to the Tribe's coal within the ceded strip. Interior's decision not to approve the tribal tax as applied to tribal coal located in the ceded strip was based on its belief at that time that that coal could not be taxed under the Tribal Constitution because it was not part of the Crow Reservation. Pet.

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[3] " 'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." *Crow I*, 650 F.2d at 1113 n.12, Pet. App. 185.

App. 19, 31; *Crow I*, 650 F.2d at 1107-08 & 1115 n.19, Pet. App. 172, 192; *Crow II*, 819 F.2d at 897, Pet. App. 93.

It was subsequently determined in *Crow II* that the Tribe's minerals within the ceded strip are part of the Crow Reservation. 819 F.2d at 896-98, Pet. App. 91-95. The United States has acknowledged, and the District Court found, that the government was mistaken in not approving the Tribe's tax as applied to its ceded strip coal. Ninth Circuit Brief for the United States at 19-21; Ninth Circuit Reply Brief for the United States at 6; Pet. App. 36, 69, 78. There is no claim or evidence that Montana or Big Horn County relied to their detriment on either Interior's disapproval of the Tribe's 1976 tax as applied to the tribal coal mined by Westmoreland or the Tribe's subsequent, unsuccessful efforts to amend its Constitution.

Westmoreland began paying the gross proceeds tax to Big Horn County in 1975 and the severance tax to Montana in 1976. Westmoreland paid $46.8 million to the State between 1975 and 1983 and $11.4 million to the County between 1976 and 1986. Pet. App. 23-27. The taxes were not paid under protest and Westmoreland did not initiate any proceeding to recover refunds. Westmoreland later entered into an agreement waiving any claim to a refund. Pet. App. 22, 37. No taxes were paid to the Tribe during these periods. Pet. App. 31, 35. Montana and Big Horn County received almost four times more money in severance and gross proceeds taxes from Westmoreland than the Tribe received in royalties under its 1974 amended lease. *Crow I*, 650 F.2d at 1107, Pet. App. 172.

The Tribe initiated discussions with Westmoreland in 1976 seeking payments in addition to the royalties required under the 1974 amended lease. Westmoreland's position was that "any additional payment to the Tribe would have to be in lieu of, rather than in addition to, the State tax." ER 12. *See Crow IV*, 92 F.3d at 830, Pet. App. 12 ("Westmoreland was willing to pay coal taxes to the Tribe as early as 1976 . . . "). Westmoreland did not make any additional payments to the Tribe until after the Court of Appeals' decision in *Crow II*. Pet. App. 35.

Montana and Big Horn County derived significant revenues from the Westmoreland mine from sources other than the illegal severance and gross proceeds taxes on Crow coal including property, income and resource indemnity taxes which have not been contested by the Tribe or the United States. Uncontroverted evidence showed that these sources generated far more income for Montana and Big Horn County than those entities expended for services related to the Westmoreland mine. *Crow IV*, 92 F.3d at 829-30, Pet. App. 11.[4]

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[4] The expert witness for the Tribe and the United States testified that from 1976 to 1986 Montana and Big Horn County received approximately $29 million in revenues from the Westmoreland mine from sources other than their invalid severance and gross proceeds taxes while the governmental costs associated with the mine during the same period were no more than $5 million. ER 121, 124, 130-33, 137, 228b-228e.

Montana's description of the services provided by the State and the County to Crow tribal members (Pet. 8-9) is inaccurate and misleading. The petitioners neglect to point out that the District Court found that those "services would have been rendered even in the absence of Westmoreland's . . . mine and were not related to the mine." Pet. App. 38. They also fail to

In 1982, following the decision in *Crow I*, the Tribe and Westmoreland reached agreement on a tax amendment to their 1974 lease which was approved by the Interior Department. Westmoreland agreed to pay the Tribe taxes equal to Montana's severance and gross proceeds taxes and the Tribe agreed to give Westmoreland a credit for severance and gross proceeds taxes paid to Montana and Big Horn County. In January 1983, the District Court issued a preliminary injunction against collection of the state severance tax and granted a motion allowing Westmoreland to deposit its severance tax payments into an escrow account managed by the Court. The same relief was granted as to the gross proceeds tax in November 1987, following the decision in *Crow II*. Pet. App. 31-32, 35.

Approximately $24 million was deposited into the Court's escrow account between 1983 and 1987. In 1989, after this Court's summary affirmance in *Crow II*, the District Court issued a final judgment distributing the funds held in escrow, including accrued interest, to the United States in trust for the Tribe. *Crow IV*, 92 F.3d at 828, Pet. App. 7; Pet. App. 35; ER 91a. There was no appeal from that judgment. Since 1988, Westmoreland has paid all severance and gross proceeds taxes on Crow coal

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mention the substantial number of jobs in Montana and Big Horn County and the significant tax and other revenues attributable to the Tribe and to the Crow Indian Reservation. *See* Plaintiffs' Ex. 351 at 31-32; V Tr. 840-48 (1994). For these and other reasons the District Court did not consider State and County services provided to Crow tribal members in its balancing of equitable factors bearing on whether the State and County were unjustly enriched. Pet. App. 38, 44-54.

to the Tribe pursuant to the 1982 amendment to the 1974 lease. Pet. App. 36. The issue in the instant case concerns the disposition of the severance taxes ($46.8 million) and the gross proceeds taxes ($11.4 million) illegally imposed on the Tribe's coal and collected by the State and County from Westmoreland.

Neither Montana nor Big Horn County placed the contested tax payments in escrow until ordered by the District Court. *Crow IV*, 92 F.3d at 829 n.3; Pet. App. 9. Significant portions of all of the coal severance revenues received by Montana were, however, deposited into the Constitutional Trust Fund established under Article IX, Section 5, of the Montana Constitution. 25% of coal severance tax revenues were allocated to the Fund between 1977 and 1979; since 1980 the Fund has received 50% of those revenues. The principal of the Fund can be spent only with the approval of ¾ of the Montana legislature. *Crow I*, 650 F.2d at 1108, Pet. App. 173; Pet. App. 25. As of June 30, 1993, the value of the Fund was $512 million. Pet. App. 25.

Montana's coal severance tax has generated "enormous revenues," principally paid by out-of-state utility customers. *Cotton Petroleum*, 490 U.S. at 186 n.17 (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 641-42 (1981) (Blackmun, J. dissenting)). From 1975 through 1993, Montana received more than $1.1 billion in coal severance taxes. As of the end of 1993, the value of those revenues (with interest based on the rate of return earned by Montana's Constitutional Trust Fund) exceeded $3.8 billion of which $263 million, less than 7%, represented the value (with interest based on the same rate of return)

of the severance taxes Montana collected on Crow coal. ER 122-23, 125, 228m-228n.

B. Crow II

The holding in *Crow II*, that Montana's severance and gross proceeds taxes as applied to Crow coal interfered with the purposes underlying the Indian Mineral Leasing Act and infringed on the Tribe's sovereignty, was based on the following findings, among others: (i) by enacting its coal taxes in 1975 and applying those taxes to coal beneficially owned by the Tribe, Montana intended to, and did in fact, appropriate most of the economic rent attributable to strip-mined coal and thereby appropriated the Tribe's mineral wealth to itself and deprived the Tribe of royalties and taxes the Tribe otherwise would have earned, *Crow I*, 650 F.2d at 1113-14, Pet. App. 185-87; *Crow II*, 819 F.2d at 902, 902-03, Pet. App. 104-05, 107; *Crow IV*, 92 F.3d at 830, Pet. App. 11-12; (ii) Montana's taxes "forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties for the Tribe," *Crow II*, 819 F.2d at 899, Pet. App. 97; (iii) Montana's coal taxes reduced tribal revenues by impairing the marketability of the Tribe's coal, *Crow II*, 819 F.2d at 903, Pet. App. 109; (iv) "[t]he tax revenue from coal production could generate funds for tribal services and provide employment for tribal members. . . . By taking revenue that would otherwise go towards supporting the Tribe and its programs . . . the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development," *Crow II*, 819 F.2d at

902-03, Pet. App. 107 (citation omitted); and (v) "Montana's coal taxes . . . interfere with tribal economic development and autonomy," *Crow II*, 819 F.2d at 903, Pet. App. 108. *See also*, *Crow III*, 969 F.2d at 848-49, Pet. App. 59-60 (reiterating several of the *Crow II* findings); *Cotton Petroleum*, 490 U.S. at 186 n.17 (distinguishing Montana's "unique," "unusually large," and "extraordinarily high" coal taxes, which "imposed a substantial burden on the Tribe" and "had a negative effect on the marketability of coal produced in Montana," from New Mexico's oil and gas taxes there at issue).

C. Crow III

Crow III concerned the claim of the United States and the Tribe to the severance and gross proceeds taxes illegally imposed and collected by Montana and Big Horn County from Westmoreland before the disputed money was paid into the District Court's escrow account.[5] The District Court denied the motion of Montana and Big Horn County to dismiss those claims. Pet. App. 67-86. Citing the Montana Supreme Court's decision in *Valley County v. Thomas*, 97 P.2d 345 (1939), as well as cases from

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[5] This claim had not been asserted by the Tribe, and the United States had not yet intervened, when *Crow I* was decided. Consequently, the issue concerning the Tribe's right to recovery of these taxes was not presented to the Court of Appeals in *Crow I*. Under these circumstances, the Ninth Circuit's observation in *Crow I* (650 F.2d at 1113 n.13, Pet. App. 186 (emphasis added)) that the Tribe "is *apparently* not entitled to any refund if the tax statutes are declared invalid," was rightly accorded no weight in that Court's subsequent decisions. *See* Pet. 6 n.3.

other jurisdictions,[6] the District Court held that "an action for restitution may be maintained by one governmental entity against another even though the plaintiff is not the source of the funds." Pet. App. 80.

The Ninth Circuit initially accepted an interlocutory appeal to determine whether the United States and the Tribe could state a claim to funds collected from the Tribe's lessee. *Crow III*, 969 F.2d at 848, Pet. App. 59. Following full briefing and oral argument, the Ninth Circuit dismissed the appeal as improvidently granted because that issue had already been decided in favor of the Tribe and the United States in *Crow II*. *Ibid*.

D. Proceedings Below (in *Crow IV*)

After the Ninth Circuit's decision in *Crow III* and a trial, the District Court issued its decision in November 1994. Its analysis was predicated on its conclusion that "it is a question of fact . . . whether a remedy in restitution arises at all in this case." Pet. App. 46-47. It recognized that Montana's illegal coal taxes had significant adverse impacts on the Tribe and had contravened Congress' overriding objective of encouraging self-government and economic development. Pet. App. 27-29, 45 and 50. In the District Court's view, however, these factors favoring the Tribe were outweighed by others. Pet. App. 31-37, 45-54. Finding that it would not be unjust for Montana and Big Horn County to retain the taxes they illegally imposed

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[6] *Humboldt County v. Lander County*, 56 P.228 (Nev. 1899); *City of Norfolk v. Norfolk County*, 91 S.E. 820 (Va. 1917); and *Board of Highway Comm'rs v. Bloomington*, 97 N.E. 280 (Ill. 1912).

and collected on Crow coal, the District Court ruled that the Tribe and the United States were not entitled to any recovery. Pet. App. 52, 54.

In its conclusions of law, the District Court reiterated its previous *Crow III* ruling that the Tribe and the United States were not automatically barred from recovering taxes paid by the Tribe's lessee. Nevertheless, the District Court found that "the lack of privity" between the Tribe and Montana "has its place in determining restitution damages." Pet. App. 48-50. It did not address Montana's argument that this Court's subsequent decision in *United States v. California*, 507 U.S. 746 (1993), undermined the vitality of the Ninth Circuit's decision in *Crow III*.

The Ninth Circuit reversed. It stated that the District Court:

> [F]ailed to give appropriate weight to the law of this case as established in the three prior appeals. In the process of weighing the equities in favor of and against restitution, the district court in effect reconsidered questions of law already decided by this Court in the prior appeals. Nearly every factor relied upon by the district court to determine that the Tribe was not entitled to relief is either contradicted or made irrelevant by our earlier holdings.

Crow IV, 92 F.3d at 828, Pet. App. 8.

With regard to the privity issue, the Ninth Circuit held that the District Court had erred and ignored the law of the case by denying relief based in part on the fact that the taxes were paid by the Tribe's lessee. *Crow IV*, 92

F.3d at 828-29, Pet. App. at 8-9. It found that Westmoreland had agreed to pay the tribal tax in the 1982 amendment to the coal lease and that Westmoreland "was willing to pay coal taxes to the Tribe as early as 1976." Consequently, "there was no reason for the [district] court to distinguish between the taxes collected before and after 1982." *Crow IV*, 92 F.3d at 830, Pet. App. 11-12. The Ninth Circuit also rejected Montana's reliance on *California* because *California* "involved an entirely different factual situation." *Crow IV*, 92 F.3d at 828-29 n.2, Pet. App. 8-9; 93 F.3d at 1194-95, Pet. App. 16.

The case was remanded to the District Court "for entry of an order directing the State and County to disgorge the improperly collected taxes." The District Court also was instructed to consider the request of the Tribe and the United States for prejudgment interest. *Crow IV*, 92 F.3d at 830, Pet. App. 12.

ARGUMENT

I. THIS CASE IS FACTUALLY UNIQUE AND LEGALLY PEDESTRIAN.

It is established that Montana and Big Horn County violated the federal rights and interfered with the federally protected sovereignty of the Tribe and thwarted Congress' overriding objectives by illegally imposing and collecting more than $58 million in taxes on the Tribe's coal. The State and County are seeking to retain the money they unlawfully obtained at the Tribe's expense in violation of federal law. They do not question the obvious but fundamental point that the relief granted by the

Ninth Circuit in *Crow IV*, disgorgement of the illegally collected taxes, would effectuate the purpose of the laws that were broken and partially make good the wrong done to the Tribe. Conversely, the denial of the restitutionary relief sought by the Tribe and the United States would leave the Tribe without a remedy for the wrongs inflicted by Montana from 1976 through 1983 and by Big Horn County from 1975 through 1986 and would allow them to profit from their own wrongdoing.

After the decision in *Crow I*, the District Court ordered that the challenged severance taxes be paid into a court supervised escrow account. Those funds with the interest they earned were awarded to the United States in trust for the Tribe following this Court's summary affirmance in *Crow II*. See *Crow IV*, 92 F.3d at 828, Pet. App. 7; Pet. App. 35. Montana neither contested nor appealed that final judgment. Since then, Westmoreland has paid all severance and gross proceeds taxes on Crow coal to the United States in trust for the Tribe pursuant to the 1982 amendment to the 1974 Crow/Westmoreland lease. As held in *Crow III*, there is no justification for treating the funds now at issue differently.

The petition does not raise an issue of broad application or importance. This case is fact specific and the legal issue presented is not likely to recur. As this Court recognized in *Cotton Petroleum*, 490 U.S. at 186 & n.17, the taxes here at issue are "unique." They were held invalid in part because they are so "extraordinarily high." Petitioners have not pointed to taxes of any other jurisdiction which impose comparable burdens on Indian tribes or tribal property. Another unusual aspect of the instant case is that Westmoreland did not seek refunds of the taxes it

paid to the State and County and later waived any claim to that money.

Due to the extraordinary nature of the taxes at issue and to their devastating impact on the mineral wealth held by the United States in trust for the Tribe, the United States intervened in support of the Tribe's claims.[7] The government's participation as a co-plaintiff precludes Montana from raising Eleventh Amendment defenses. *Arizona v. California*, 460 U.S. 605, 614 (1983). Cf. *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996); *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___ (No. 94-1474, decided June 23, 1997), in which suits by tribes against states and state officials were held barred by the Eleventh Amendment. The absence of any Eleventh Amendment issues due to the presence of the United States underscores the uniqueness of this case and further diminishes the likelihood that the issue this Court is being asked to consider will arise in future actions.[8]

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[7] The large amount of money at stake reflects the "enormous revenues" generated by Montana's "extraordinarily high" coal taxes and the extent to which the collection of those taxes unjustly enriched the State and County and deprived the Tribe of revenues it otherwise would have received. *See supra* at 9-10.

[8] During the past 25 years, the United States has participated as a party in few, if any, cases challenging the validity of state taxes as applied to Indians, Indian tribes and their property or activities. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

From a legal standpoint, there is nothing unusual or remarkable about the relief granted by the court below. The Ninth Circuit simply did what federal courts have been doing "[f]rom the earliest years of the Republic," exercising their inherent equitable powers to remedy the invasion of federally secured rights. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-67 (1992) (" 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done' "), *citing, inter alia, Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); and *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838), and *quoting Bell v. Hood*, 327 U.S. 678, 684 (1946). As stated in *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971), "[o]nce a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[9] It is also

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[9] In fashioning appropriate relief, the primary consideration is carrying out the purposes of the statute that was violated. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (the determination of appropriate relief "must be measured against the purposes which inform [the statute]"); *Mitchell v. De Mario Jewelry*, 361 U.S. 288, 292 & 296 (1960) (the "statutory purposes leave little room for the exercise of discretion not to order reimbursement"). Equitable relief required to remedy the invasion of federally secured rights and to effectuate the statutory purpose may be denied only if based on an estoppel or on the plaintiff's closely related illegal conduct. *Albemarle*, 422 U.S. at 417-25; Dan B. Dobbs, *Dobbs Law of Remedies*, § 2.4(7) at 119 (2d.Ed. 1993). Contrary to the district court's decision below, federal courts do not have broad or unfettered discretion to exercise their equitable powers in an *ad*

well established that "the federal courts [are not] restricted to the remedies available in state courts in enforcing . . . federal rights" and that the relief available in federal court for the violation of federal rights may not be "unduly circumscribed by state law." *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 350-51 (1939). *Accord, Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979).

The Ninth Circuit's disgorgement remedy in the instant case is just like the equitable relief granted to correct violations of constitutional rights, as exemplified in *Swann*, the equitable remedies fashioned to give effect to Indian treaty fishing rights, as in *Fishing Vessel Ass'n*, 443 U.S. at 692-96, the constructive trust ordered to carry out the national security policy of the United States embodied in a federal employment contract, as in *Snepp v. United States*, 444 U.S. 507, 514-16 (1980) (per curiam), and the declaratory and monetary relief required to effectuate the statutory purpose of preventing obstructions to commerce on navigable waterways, as in *Wyandotte Transportation v. United States*, 389 U.S. 191, 201-05 (1967). In these cases and many others, federal courts have exercised their inherent equitable powers to correct the wrongs inflicted on plaintiffs due to invasions of their federally secured rights. This case is no different.

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hoc manner "which varies like the Chancellor's foot." *Albemarle*, 422 U.S. at 417.

II. *CALIFORNIA* HAS NO BEARING ON THIS CASE.

Montana's principal argument is that the decision below conflicts with the holding in *United States v. California*. As the Ninth Circuit said, "*California* involved an entirely different factual situation." *Crow IV*, 98 F.3d at 1195, Pet. App. 16.

California does not preclude the Tribe's recovery for each of the following reasons: (i) the instant case is governed by the principle that, when *federally* secured rights are invaded, federal courts will grant appropriate relief to effectuate the federal purposes and make good the wrong done, whereas the government's claim in *California* was predicated exclusively on *state* law; (ii) there is no requirement that the relief awarded by federal courts to remedy violations of federal law must fit precisely within the confines of established common law causes of action; (iii) all of the essential elements of the common law assumpsit action for money had and received are satisfied; (iv) *California* does not hold that only taxpayers may seek recovery of illegally collected taxes; and (v) none of the factors which made it equitable for the state to be allowed to keep the taxes it collected from the federal government's contractor is present here.

A. *California* Did Not Involve The Equitable Powers Of Federal Courts To Remedy Violations Of Federal Law.

In *California*, the United States attempted to federalize a cause of action predicated on state law in order to circumvent state filing requirements which otherwise

barred the claim.[10] This Court held that under these circumstances the United States could not use "the existence of an obligation to indemnify [its contractor] to create a federal cause of action for money had and received to recover state taxes paid by [its contractor]. . . ." 507 U.S. at 754. The federal action was "inappropriate . . . because the Government is in no better position than as a subrogee of its [private] contractor." 507 U.S. at 752.[11]

Here, in stark contrast, the underlying claims of the Tribe and the United States are predicated on federal law, the violation of the Tribe's rights under the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g, and interference with the Tribe's sovereignty. Montana directly violated the *Tribe's* rights under federal law whereas in *California* the government stood in the shoes of its subrogee, the taxpayer, whose claims were predicated exclusively on

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[10] The government's claim was "posited upon the interpretation of a state-created exemption from a state[-] created sales tax." The United States sued in its proprietary capacity and stood in the shoes of its contractor; there was no sovereign interest of the United States. There were no allegations that the state taxes were preempted by federal law or violated the Constitution. 507 U.S. at 748-51.

[11] This Court also noted that different rules apply to the United States depending on whether it is acting in its proprietary capacity, as in *California*, or as a sovereign. 507 U.S. at 757-58. Where, as here, the United States sues as trustee on behalf of Indian beneficiaries, it is exercising its sovereign authority. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 473-75 & n.13 (1976); *United States v. Minnesota*, 270 U.S. 181, 194-95 (1926); *United States v. Rickert*, 188 U.S. 432, 444-45 (1903).

state law.[12] The remedy issue in this case therefore is governed by the principle, recently reaffirmed in *Franklin*, that where *federally secured rights* are invaded, federal courts will grant relief necessary to effectuate the congressional purpose and to make good the wrong done.[13]

Moreover, Montana's reliance on *California* is predicated on a fundamentally flawed, albeit unspoken, major premise. Its argument mistakenly assumes that when a violation of federal law is established, the relief federal courts may grant is limited to traditional common law remedies. That is not the law. In *Wyandotte*, for example, this Court upheld the right of the United States to impose

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[12] The United States and the Tribe are not claiming by, through or under Westmoreland. The Tribe's action and standing are based on the violation of its federally secured rights, not on a voluntary indemnification agreement. The Tribe, not Westmoreland, is the intended beneficiary of the federal laws promoting Indian mineral development and recognizing and protecting tribal sovereignty.

[13] Westmoreland makes no claim to the illegally collected taxes, so there is no contest between the Tribe and Westmoreland regarding the disposition of those funds. If such a claim were presented, the guiding principle would be to award the funds in the manner that best effectuated the purpose of the federal laws Montana violated. *See supra* at 17 n.9. Westmoreland's position from the outset was that it was willing to pay either a tribal or state tax but not both, *Crow IV*, 92 F.3d at 830, Pet. App. 11-12; Tribe's ER 12-13, so it is difficult to understand how a court of equity could justify granting Westmoreland immunity from *both* state and tribal taxes. In any event, whatever *Westmoreland* did or did not do, or would have or would not have done, does not have any bearing on whether Montana should be allowed to keep the money it obtained in violation of the *Tribe's* federally secured rights and at the *Tribe's* expense.

liability on shipowners under the Rivers and Harbors Act of 1895 for the negligent sinking of their vessels because that remedy was necessary to fulfill the statutory purpose. This Court specifically declined to decide whether the United States would have been entitled to that relief in the absence of the statute. 389 U.S. at 196 n.5. *See also* the discussion *supra* at 17-18. Montana has not cited a single case, and the Tribe is not aware of any, in which equitable relief for the violation of a federal law was denied on the ground that not all the prerequisites for a common law cause of action were satisfied.

The instant case involves a cognizable cause of action brought pursuant to federal laws. Violations of these laws have been established. Consequently, the issue of appropriate relief is controlled by *Franklin* and the long line of decisions on which it relies, not *California*.

B. The Fact That The Tribe Did Not Pay The Illegal Taxes Does Not Foreclose The Disgorgement Remedy.

Assuming arguendo that the claim of the Tribe and the United States is predicated on assumpsit and constructive trust causes of action (as opposed to equitable relief to remedy violations of federal law), all of the required elements of those actions are satisfied. Assumpsit, an action for money had and received, like the imposition of a constructive trust,[14] requires proof of

[14] Both assumpsit and constructive trust actions are predicated on a claim of unjust enrichment. The difference is that a successful assumpsit action results in a judgment

three elements: (i) a wrongful act; (ii) specific property acquired by the wrongdoer which is traceable to the wrongful behavior; and (iii) a reason why the party holding the property should not be allowed in good conscience to keep it. *Alsco-Harvard Fraud Litigation*, 523 F.Supp. 790, 806-07 (D.D.C. 1981) (and cases therein cited). *See also, Schaeffer v. Miller*, 41 Mont. 417, 423, 109 P. 970, 973 (1910); Pet. App. 43, 70-71. If these elements are present, the law implies the existence of a contract to turn over the wrongfully acquired property to its rightful owner. *See, Midwest Aviation, Inc. v. General Electric Credit Corp.*, 907 F.2d 732, 736-37, 743-44 (7th Cir. 1990) ("[q]uasi-contractual duties arise only in situations of unjust enrichment, situations where 'one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which *ex cequo et bono* belongs to another' ").

This Court's decision in *Snepp* illustrates the use of the constructive trust remedy to correct a violation of federal law. *Snepp* involved the publication of a book by a former CIA agent contrary to the covenant in his employment agreement not to publish any material relating to the CIA without the agency's prior approval. The wrongful act was the agent's publication of a book about the CIA without approval. The property acquired by the agent traceable to his wrongful behavior was the money derived from the sale of the book. The reasons the agent was not allowed to keep that money were that the book

imposing personal liability whereas a constructive trust operates against specific property. Pet. 13 & n.4; Pet. App. 43, 70-71.

was written in violation of the agent's employment covenant and that it was equitable to require him to disgorge the benefits of his faithlessness. 444 U.S. at 515. In addition, this Court noted that the constructive trust remedy conformed the relief to the dimensions of the wrong and that that relief was the most equitable and effective means of fulfilling the purpose of the covenant, protecting intelligence that could affect the Nation's security interests. 444 U.S. at 514-16.

The instant case is on all fours with *Snepp*. Here, the wrongful acts are the imposition and collection of the invalid state coal taxes in violation of federal law. The wrongfully acquired property is the $58 million in illegally collected coal tax revenues. The reasons why Montana should not be allowed to keep that money and why it should be paid over to the Tribe are that it was acquired in violation of the Tribe's rights under federal law and that disgorgement would effectuate the purpose of those laws and at least partially make good the wrongs done to the Tribe.

Nothing more is required. In its December 1990 decision denying Montana's motion for summary judgment, the District Court carefully considered and squarely rejected Montana's argument that restitutionary relief is precluded because the taxes were paid to Montana and Big Horn County by Westmoreland, not by the Tribe. Relying on case law from Montana[15] as well as other jurisdictions,[16] the District Court correctly concluded that the

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[15] *Valley County v. Thomas*, 109 Mont. 345, 97 P.2d 345 (1939).

[16] *Humboldt Co. v. Lander Co.*, 56 P. 228 (Nev. 1899); *City of Norfolk v. Norfolk County*, 91 S.E. 820, 822-24 (Va. 1917); and

claim of the Tribe and the United States to the illegally collected taxes turns on the issue of unjust enrichment, not the identity of the taxpayer. Pet. App. 79-81. Here, as in *Snepp*, the relationship between the wrongdoers and their victims that is necessary to obtain appropriate equitable relief is founded on the violations of the victims's federally secured rights. That is precisely what the Ninth Circuit held in *Crow II*.

California does not stand for the proposition that only taxpayers may recover taxes illegally imposed and collected by governmental entities. This Court pointed out that the federal government's contractor had challenged the state's taxes, had its day in court, settled its claim and gone home. 507 U.S. at 752. The federal government's claim was derived from its contractor and both the government and its contractor had a full and fair opportunity to challenge the validity of California's taxes under state law. 507 U.S. at 750, 756-57. The failure of the federal government to comply with state filing requirements barred its claim for a tax refund. 507 U.S. at 756-57. Since an adequate remedy was available which the federal government had failed to utilize, it was not unjust for California to keep the money it collected from the contractor, just as it would be able to retain taxes received from any other taxpayer who failed to follow procedures required to obtain a refund. When the federal government "challenge[s] a state tax on state-law grounds," it should not be treated any differently than other taxpayers "simply because it is the Government." 507 U.S. at 759-60.

Board of Highway Comm'rs v. Bloomington, 97 N.E. 280, 283-85 (Ill. 1912).

This case is completely different. The Tribe's claim is predicated on the unlawful appropriation and conversion of its mineral wealth and the violation of its federally secured rights, not on state law or a voluntary indemnification agreement. The Tribe is not claiming by, through or under Westmoreland. *See supra* at 21 n.12. There is no contention that the Tribe's rights have lapsed or that its claim is barred. Nor is there an attempt to circumvent a stale state claim by substituting a federal cause of action. Granting the relief sought by the Tribe and the United States would not result in unfair treatment vis-a-vis other taxpayers.[17] In short, none of the factors which made it equitable for California to be allowed to keep the taxes it collected from the federal government's contractor is present here.

III. THERE IS NO CONFLICT WITH THE TENTH CIRCUIT'S DECISION IN UTE INDIAN TRIBE V. STATE TAX COMMISSION.

The decision below does not conflict with *Ute Indian Tribe v. State Tax Comm'n*, 574 F.2d 1007 (10th Cir. 1978),

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[17] *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages, and Tobacco*, 496 U.S. 18, 48 (1990) (states have no legitimate interest in being able to retain taxes imposed and collected in violation of federal law); *United States v. City of Spokane*, 918 F.2d 84, 89 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) (municipality required to disgorge the taxes it illegally collected from the Red Cross because "the only logical relief, aside from precluding further taxation, is to order the improperly taken monies refunded"); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990) (Indian tribe entitled to recover illegal taxes collected by California from private timber companies in violation of federal Indian law).

cert. denied, 439 U.S. 965 (1978). *Ute* was an action by an Indian tribe to invalidate Utah's taxes on sales of personal property by a tribal enterprise located within a reservation. Following this Court's decision in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Tenth Circuit held that the state tax was valid as applied to sales to non-Indians but invalid as applied to sales to Indians. The Tribe's claim for return of the invalid taxes paid by the buyers of the goods, collected by the tribal enterprise and turned over to the state was summarily rejected on the ground that only the buyers could seek recovery or refund of the taxes. 574 F.2d at 1009. *Ute* has not been followed or cited in any subsequent decision for the proposition that non-taxpayers may not seek to recover illegally collected taxes.

There are at least four critical distinctions between the instant case and *Ute*. First, in the instant case, unlike *Ute*, the state's "extraordinarily high" taxes operated against the Tribe's own property and significantly diminished its value. *See supra* at 5 and 10-11. In *Ute*, by contrast, no tribal property was involved and the state's taxes operated only against the individual buyers. Second, in the instant case the Ninth Circuit expressly found, based on substantial evidence, that Montana's taxes took revenue that would otherwise go to the Tribe. *See supra* at 5, 7, 10-11, and 13-14. There was no such claim or finding in *Ute*. Third, the tribe in *Ute* did nothing more than collect the state's taxes whereas Montana's taxes imposed substantial burdens on the Tribe and had a negative effect on the Tribe's ability to market its coal. *Cotton Petroleum*, 490 U.S. at 186 n.17; *Crow II*, 819 F.2d at 899, Pet. App. 97-98. Fourth, here, unlike *Ute*, the rights of the Tribe

under a federal statute were violated and the remedy fashioned by the Ninth Circuit is necessary to effectuate the purpose of that statute during the periods the taxes were collected illegally by Montana and Big Horn County.

In short, the *Ute* Court held that the tribe was not the injured party so far as the recovery of invalid sales taxes on personal property was concerned. The taxes involved here are totally different. The findings of *Crow I, II, III* and *IV* clearly establish that the Tribe was the rightful recipient of the taxes illegally imposed on the Tribe's trust assets and collected from Westmoreland.

For all of these reasons, the outcomes in *Ute* and *Crow IV* are compatible. The Tribe certainly is a proper party to seek recovery of the coal taxes which unjustly enriched Montana and Big Horn County.

CONCLUSION

With full awareness of the risks, Montana and Big Horn County deliberately and wrongfully appropriated the Tribe's mineral wealth and obtained enormous benefits for themselves in violation of federal law. The Ninth Circuit fashioned an appropriate remedy to correct those wrongs. Its decision does not conflict with the decision of this or any other court. It is supported by and is consistent with the long line of cases affirming the broad equitable power of federal courts to fashion appropriate remedies to correct invasions of federally secured rights. The facts of this case are unique and are not likely to

recur. There is no issue that warrants review by this Court.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

MONTANA, ET AL., PETITIONERS

v.

CROW TRIBE OF INDIANS, ET AL.

CROW TRIBE OF INDIANS,
CONDITIONAL CROSS-PETITIONER

v.

MONTANA, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the State of Montana and Bighorn County were properly required to surrender to the Crow Tribe of Indians the proceeds of illegal taxes that they imposed on the Tribe's coal and that were paid by Westmoreland Resources, Inc., which extracted the coal pursuant to a lease agreement with the Tribe.

2. Whether the district court and the court of appeals properly concluded that the imposition of the illegal taxes did not cause the failure of the Tribe to receive royalties from Shell Oil Company pursuant to other coal-mining leases that never resulted in mining operations.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1829

MONTANA, ET AL., PETITIONERS

v.

CROW TRIBE OF INDIANS, ET AL.

No. 96-1984

CROW TRIBE OF INDIANS,
CONDITIONAL CROSS-PETITIONER

v.

MONTANA, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 92 F.3d 826, amended, 98 F.3d 1194. The opinion of the district court (Pet. App. 17-57) is unreported.

Previous decisions in the case include (1) the initial decision of the district court (Pet. App. 197-227), reported at 469 F. Supp. 154; (2) an opinion by the court of appeals reversing and remanding that decision (Pet. App. 167-196), reported at 650 F.2d 1104, amended, 665 F.2d 1390 (*Crow I*); (3) the decision of the district court on remand (Pet. App. 110-166), reported at 657 F. Supp. 573; (4) an opinion by the court of appeals reversing and remanding that decision (Pet. App. 88-109), reported at 819 F.2d 895 (*Crow II*); (5) a memorandum order of this Court (Pet. App. 87), summarily affirming the judgment in *Crow II*, reported at 484 U.S. 997; (6) an unreported opinion of the district court on remand (Pet. App. 67-86), and an unreported order of certification for interlocutory appeal (Pet. App. 61-66); and (7) an opinion by the court of appeals dismissing the interlocutory appeal (Pet. App. 58-60), reported at 969 F.2d 848 (*Crow III*).

JURISDICTION

The judgment of the court of appeals (Pet. App. 2) was entered on August 6, 1996. Petitions for rehearing were denied on November 21, 1996 and February 21, 1997. Pet. App. 228-229; Cross-Pet. App. 1-2. The petition for a writ of certiorari in No. 96-1829 was filed and docketed on May 16, 1997. The conditional cross-petition for a writ of certiorari in No. 96-1984 was filed on June 13, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, the Crow Tribe of Indians (Tribe) and Westmoreland Resources, Inc. (Westmoreland) entered into a coal-mining lease agreement pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.* (authorizing leasing of Indian lands for

mining purposes). Pet. App. 171, 199. The agreement granted Westmoreland the right to extract coal located in an area known as the "ceded strip," which is adjacent to the surface boundaries of the Tribe's Reservation in Montana. *Ibid.* The surface of the ceded strip was once part of the Tribe's Reservation, but was subsequently ceded to the United States for settlement, primarily by non-Indians. *Ibid.* The mineral rights in the ceded strip are held in large part by the United States in trust for the Tribe. *Ibid.* The minerals are legally a part of the Tribe's Reservation. *Id.* at 195.

The original lease was renegotiated in 1974, and Westmoreland began mining operations. Pet. App. 122. In 1975, Montana enacted statutes imposing a severance tax and a gross proceeds tax on all coal produced in the State, including coal belonging to the Tribe.[1] *Id.* at 6, 23. Those statutes were adopted despite the opposition of the Tribe, which objected to Montana's taxation of tribal resources. *Id.* at 23. The Montana legislature was aware, at the time it enacted the tax statutes, that their legality as applied to tribal resources would subsequently be determined by the courts. *Id.* at 9.

Westmoreland began paying gross proceeds taxes in 1975 and severance taxes in 1976. Pet. App. 23-27. During the period from 1975 to 1982, the severance tax rate was 30% of the contract sales price of the coal extracted by Westmoreland, while the gross proceeds tax rate was approximately 5% of the con-

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[1] Although it was enacted pursuant to state statute, the gross proceeds tax was ultimately payable to petitioner Big Horn County. Pet. App. 19-20, 25-27. For ease of reference, the petitioners are referred to collectively as "Montana."

tract sales price. *Id.* at 25-26. Montana set the severance tax rate at 30% because it intended to "appropriate most of the economic rent"[2] from tribal coal. *Id.* at 10, 185. During the period from 1975 to 1982, Westmoreland paid $46.8 million in severance taxes and $11.4 million in gross proceeds taxes. *Id.* at 24-27. A significant percentage of the severance taxes was placed in a trust fund containing only the proceeds of severance taxes imposed on Montana coal producers. *Id.* at 24-25, 173. As of June 30, 1993, the book value of that trust fund was in excess of $500 million. *Id.* at 25.

In 1976, the Tribe enacted its own severance tax of 25% of the contract price of coal mined on the Reservation. Pet. App. 19. That tax was originally approved by the Department of the Interior only as to coal located within the surface boundaries of the Tribe's Reservation, and not as to coal located under the ceded strip. *Id.* at 93. The Department of the Interior's refusal to approve the Tribe's tax as to coal extracted from the ceded strip was later determined to be erroneous, and "at all relevant times the Tribe had a valid coal mining tax applicable to Westmoreland's mining on the Ceded Strip." *Id.* at 36. Westmoreland did not pay taxes to the Tribe, however, because it disputed the validity of the Tribe's tax as applied to coal extracted from the ceded strip, and because it wished to avoid concurrent taxation. *Id.* at 31.

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[2] "'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." Pet. App. 185 n.12.

2. In 1978, the Tribe filed a suit challenging the legality of the severance and gross proceeds taxes, arguing that the taxes were preempted by federal law. Pet. App. 19. The district court dismissed the complaint for failure to state a claim. *Id.* at 197-227. The Tribe appealed to the Ninth Circuit, which reversed and remanded. *Id.* at 167-196. Specifically, the Ninth Circuit held that the Tribe had alleged facts which, if proven, would establish that the challenged taxes were preempted by the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*, and infringed the Tribe's right of self-government. Pet. App. 185-196.

In 1982, after the decision in *Crow I*, the Tribe and Westmoreland entered into an amended lease, pursuant to which Westmoreland agreed to pay to the Tribe a tax equal in amount to the coal taxes imposed by Montana. Pet. App. 31-32. The agreement also, however, permitted Westmoreland to claim a credit against the tribal tax for any severance and gross proceeds taxes it paid to Montana. *Id.* at 32.

In January 1983, the district court enjoined Westmoreland's payment of the state severance tax, and ordered Westmoreland to deposit into the registry of the court amounts equal to those payable under the severance tax.[3] Pet. App. 35. Also in 1983, the United States intervened on behalf of the Tribe in order to protect the United States' interests as trustee of the coal upon which Montana's taxes were levied. Pet. 5 n.2.

3. After a trial in January 1984, the district court once again concluded that application of the severance and gross proceeds taxes to tribal coal extracted from

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[3] A similar order was entered as to the gross proceeds tax in 1987. Pet. App. 35.

the ceded strip was not preempted by federal law. Pet. App. 110-166. The Tribe appealed, and the court of appeals once again reversed. *Id.* at 88-109. In reversing, the court of appeals held that the severance and gross proceeds taxes on the Tribe's coal

> increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

Id. at 97. Because the taxes interfered with the "firm federal policy of promoting tribal self-sufficiency and economic development," *id.* at 95, the court of appeals held that they were presumptively preempted, unless supported by a sufficient state interest, *id.* at 100.

The court of appeals further held that Montana had not carried the "heavy burden" of establishing that its taxes on the Tribe's coal were narrowly tailored to support legitimate state interests. Pet. App. 103. To the contrary, the evidence indicated that the coal taxes were not necessary to compensate Montana for the costs created by coal mining, since Montana's revenues from state, local, and excise taxes on the mining activity were more than sufficient to offset the coal-related costs documented by Montana. *Id.* at 103-105. In addition, most of the revenue from the challenged taxes was devoted to purposes other than environmental or coal-related services. *Id.* at 104. Thus, the court of appeals concluded, Montana imposed its taxes on the Tribe's coal "to profit from the Indians' valuable coal resources." *Ibid.* Because Montana had no legitimate interest in appropriating

the Tribe's mineral wealth, the court held, Montana's severance and gross proceeds taxes were not narrowly tailored to advance legitimate state interests, and were preempted by federal law. *Id.* at 105. For similar reasons, the court of appeals held that the taxes were an unlawful infringement upon the Tribe's sovereignty. *Id.* at 105-107.

4. Montana appealed to this Court, which summarily affirmed the judgment of the court of appeals. Pet. App. 87. The case then returned to the district court for further proceedings. In 1989, the district court turned over to the Bureau of Indian Affairs, as trustee for the Tribe, the tax payments that Westmoreland had been depositing into the court's registry pursuant to the district court's earlier orders. *Id.* at 35. Those funds represented Westmoreland's severance tax payments beginning in 1983 and its gross receipts tax payments beginning in 1987, along with accumulated interest. *Ibid.*

The parties then turned their attention to the coal-tax payments Westmoreland had made during the period between 1975 and the date of the orders directing Westmoreland to deposit its tax payments into the court registry. The United States and the Tribe filed amended complaints in which they sought to recover those payments, which totalled approximately $58 million. Pet. App. 24-27, 243-260. They argued that the taxes had been determined to be unlawful, that Montana therefore was not entitled to retain the proceeds of the taxes, that the taxes had substantially injured the Tribe, and that the Tribe, as owner of the coal that had been unlawfully taxed, was legally and equitably entitled to the proceeds of the unlawful taxes. *Id.* at 243-260.

Montana moved for summary judgment on various grounds, including that the district court lacked jurisdiction over what were, in reality, state law claims for restitution, and that in any event the Tribe and the United States had failed to make out the essential elements of the theories of restitution upon which they had relied. Pet. App. 72. The district court denied the motion for summary judgment, holding that the Tribe's request for restitution sounded in federal law, invoking the federal courts' "broad equitable powers to construct a remedy" for the violation of a federal law. *Id.* at 76. The district court further concluded that its power to fashion an equitable remedy under federal law was not limited by the scope of state-law causes of action for restitution. *Id.* at 79-84. Finally, the district court ruled that the question of what equitable remedy, if any, would be appropriate turned on unresolved factual matters. *Id.* at 85.

The district court certified its order denying summary judgment for interlocutory appeal. Pet. App. 61-66. Although it originally granted permission for an interlocutory appeal, the court of appeals subsequently concluded that permission to appeal had been improvidently granted, and dismissed the appeal. *Id.* at 58-60. In dismissing the appeal, the court of appeals ruled that it had already addressed the claim that the Tribe could not recover the proceeds of Montana's illegal taxes because the Tribe had not paid the taxes. *Id.* at 59-60. Citing its earlier opinions in *Crow I* and *Crow II*, the court of appeals indicated that the Tribe was entitled to such recovery because Montana's illegal taxes on tribal coal had taken revenue from the Tribe. *Ibid.*

5. The case returned to the district court, which conducted a second trial in 1994. Pet. App. 22-23.

There were two principal issues at that trial. The first was whether the Tribe was equitably entitled to the proceeds of Montana's illegal taxes on the Tribe's coal. *Id.* at 23-38, 43-54. The second was the Tribe's separate claim that Montana's coal taxes had unlawfully interfered with the Tribe's business and contractual relationship with Shell Oil Company (Shell), thereby causing the Tribe to lose revenues it would have received from coal-mining activities that would have occurred under leases with Shell but for Montana's illegal taxes. *Id.* at 38-42, 54-57.

The district court ruled against the Tribe on both issues. With respect to the proceeds of Montana's illegal coal taxes, the district court relied on a number of factors that it believed undermined the Tribe's claim of an equitable entitlement: (1) the Tribe did not provide significant governmental services to the ceded strip; (2) Montana's coal severance tax had been found to be lawful, as against Commerce Clause and Supremacy Clause challenges, in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981); (3) Montana provides certain governmental services to the Tribe; (4) the illegality of Montana's coal taxes was not obvious during the relevant period; (5) the Tribe did not pay the taxes at issue, and Westmoreland, which had paid the taxes, had not sought to avoid or recover them; (6) the Tribe could have taken steps to try to cause Westmoreland to challenge Montana's taxes; and (7) even if Montana had not imposed the coal taxes, the Tribe would not have been able to impose a tax on the coal mined by Westmoreland, because the Department of the Interior had not approved the Tribe's effort to impose such a tax on coal mined in the ceded strip. Pet. App. 47-52.

As to the Tribe's claim regarding its efforts to negotiate coal-mining leases with Shell, the district court found that the coal taxes did not cause those efforts to fail. Pet. App. 42, 56. Specifically, the district court found that although Shell and the Tribe entered into a coal-mining lease agreement in 1972, the Tribe declared that lease invalid in 1974, before Montana imposed the taxes at issue. *Id.* at 38-39. The Tribe's decision to declare the lease invalid was prompted by its dissatisfaction with the terms of the lease, in particular by concerns about the impact of the lease on its sovereignty given that mining activities under the lease were to be conducted within the Reservation. *Id.* at 39.

The Tribe subsequently challenged the legality of the 1972 Shell lease in federal court, obtaining a judgment vacating the lease on the ground that applicable federal regulations had not been followed. Pet. App. 39-40. The Tribe and Shell sought to agree on new lease terms, but those negotiations were delayed by disagreements over "acreage size, options on additional tracts, tribal control over mining operations, and tribal ordinance restrictions." *Id.* at 41. Although Montana's coal taxes "left less room" for the Tribe and Shell to negotiate financial terms favorable to the Tribe, the district court found that the taxes were not responsible for the Tribe's loss of revenue due to the protracted negotiations between the Tribe and Shell.[4] *Ibid.* That delay, and the ultimate failure

[4] Ultimately, the Tribe and Shell negotiated a new lease agreement, in 1980. Pet. App. 41. Shell never commenced operations under that agreement, however, and it relinquished its rights under the agreement in 1985. *Id.* at 41-42.

of Shell to conduct mining operations, were the result of other "causative factors." *Id.* at 42.

6. The Tribe and the United States appealed the judgment of the district court, and the court of appeals reversed in part and affirmed in part. Pet. App. 1-16. With respect to the proceeds from the illegally imposed taxes, the court of appeals held that the district court had erred in concluding that the Tribe was not equitably entitled to them. *Id.* at 7-12. Although the Tribe had not paid the taxes at issue, it had stated a claim for equitable relief, the court of appeals held, because the taxes "had an adverse impact on the Tribe's ability to market its coal, increased the costs of coal production, and reduced the royalty the Tribe could charge, 'taking revenue that would otherwise go towards supporting the Tribe and its programs.'" *Id.* at 11 (quoting *Crow II*, 819 F.2d at 902).[5]

The court of appeals further held that the factors the district court relied upon to reach a contrary conclusion were either irrelevant or contrary to earlier holdings of the court of appeals. Pet. App. 7-

[5] The court of appeals distinguished *United States* v. *California*, 507 U.S. 746 (1993). There, this Court held that although the United States had reimbursed a government contractor for state taxes the contractor had paid to California, it could not recover those taxes in federal court, because the contractor had settled its tax liability with California, there was no claim that California's taxes violated federal law, and the United States had failed to seek tax relief under applicable state procedures. *Id.* at 751-759. The court of appeals in this case pointed out that *California* was a case in which the United States had voluntarily agreed to reimburse its contractor, while the Tribe in this case had done nothing comparable. Pet. App. 16. It also pointed out that there had been no determination in *California* that California's tax was unlawful. *Id.* at 8 n.2.

12. Specifically, the court of appeals concluded that the trial court had ignored direct evidence that the Montana legislature was aware that its coal taxes were potentially preempted, and had not put the contested revenues in escrow until well after the Tribe's lawsuit was underway. *Id.* at 9 & n.3. The court of appeals also emphasized its earlier holding, in *Crow I*, that Montana's coal taxes were "intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal." *Id.* at 10.

The court of appeals rejected the district court's reliance on the fact that Montana provided government services to the Tribe, because Montana would have furnished those services even if there had been no coal mining. Pet. App. 10-11. Similarly, the costs to Montana of any coal-related services were more than offset by revenues from coal-related taxes other than those at issue. *Id.* at 11. In sum, the court of appeals concluded:

> The equities in favor of restoring improperly collected revenues to the entity entitled to receive them are strong. Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

Id. at 12.

The court of appeals therefore remanded the case for entry of an order directing Montana and Big Horn County to disgorge the illegally obtained taxes. Pet. App. 12. The court of appeals did not resolve outstanding disputes about whether the Tribe was entitled to

prejudgment interest and attorney's fees. *Id.* at 12, 14.

Finally, the court of appeals affirmed the district court's denial of the Tribe's claim for relief with respect to Shell Oil. The court of appeals agreed with the district court that the Tribe had failed to show that the illegal coal taxes were the cause of the breakdown of the relationship between the Tribe and Shell. Pet. App. 12-14.[6]

ARGUMENT

Petitioners no longer dispute that they obtained $58 million through illegal taxes assessed on coal owned by the Tribe. They no longer dispute that their "unique," "unusually large," and "extraordinarily high" taxes "imposed a substantial burden on the Tribe." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 186 & n.17 (1989).[7] They seek review solely

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[6] The court of appeals distinguished two cases upon which the Tribe had relied in support of its argument that Montana should bear the burden of proving that its illegal taxes did not result in the breakdown of the relationship between the Tribe and Shell. Pet. App. 13 n.4 (discussing *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), and *Mills* v. *Electric Auto-Light Co.*, 396 U.S. 375, 381-385 (1970)). The court of appeals distinguished *Bigelow* on the ground that the relaxed approach *Bigelow* took to the plaintiff's burden of proof was limited to proof of damages, and did not apply to the plaintiff's burden of establishing causation. *Ibid.* It distinguished *Mills* on the ground that the principles announced in that case, involving securities law, should not be extended into the present context. *Ibid.*

[7] The discussion of Montana's coal taxes in *Cotton Petroleum* was part of this Court's explanation of the differences between those taxes, which this Court had previously found to be unlawful, and the tax imposed by New Mexico on tribal

of the question whether they should nevertheless be permitted to retain the profits of their wrongdoing. The court of appeals correctly ruled that they must instead return those profits to the Tribe, the owner of the coal from which petitioners had "intentionally and illegitimately * * * appropriate[d] most of the economic rent." Pet. App. 10. Because the court of appeals' decision is consistent with the decisions of this Court and other circuits, and turns on the unique factual circumstances surrounding petitioners' illegal taxation of coal owned by the Tribe, this Court's review is not warranted.

The Tribe's conditional cross-petition does not, in any event, warrant review. The court of appeals' ruling that the Tribe was not entitled to recover damages in connection with the failed Shell lease rests on the factual conclusions of that court and the district court that the coal taxes did not cause the failure of that lease. Those factual conclusions do not merit further review. Nor does the ruling of the court of appeals conflict with decisions of this Court which have in certain contexts eased plaintiffs' burden of proving causation and damages.

1. Petitioners contend that the decision of the court of appeals conflicts with this Court's decision in *United States* v. *California*, 507 U.S. 746 (1993). That contention is erroneous.

In *California*, the United States sought to recover taxes that a federal contractor had paid to the State of California. 507 U.S. at 749. As this Court repeatedly emphasized, the state taxes at issue in that case were not alleged to have violated any federal right or

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leases of natural resources, which the Court upheld in *Cotton Petroleum*. 490 U.S. at 186 & n.17.

sovereign interest of the United States. *Id.* at 748 ("we are not presented with a claim that the state tax is unconstitutional"), 749, 752-753, 757-758.[8] Rather, the United States' claim was that the taxes were invalid as a matter of state law, and that the United States should be permitted to assert that claim in federal court because it had agreed to reimburse the contractor for costs, including state taxes. *Id.* at 751.

This Court held that the United States was not entitled to recover the taxes. *California*, 507 U.S. at 751-760. In reaching that conclusion, the Court held that the United States' voluntary decision to agree to reimburse its contractor for state taxes did not give rise to "a federal cause of action for money had and received to recover state taxes paid by" the contractor. *Id.* at 754. The Court further pointed out that although the United States had a right to be subrogated to the contractor's claim against California, the contractor had settled its claim with California. *Id.* at 756. Because the contractor's "rights have lapsed and its claims are barred," the Court held, general subrogation principles barred recovery by the United States. *Ibid.* Moreover, although general subrogation principles do not necessarily apply to the United States acting in its sovereign capacity, the United States was not acting in its sovereign capacity when it agreed to reimburse the contractor for state taxes. *Id.* at 757-758. Finally, the Court held that the United States' delay in bringing its federal suit was an

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[8] In fact, such a claim was unavailable in *California*, because this Court had previously held, in *United States* v. *New Mexico*, 455 U.S. 720, 733-735 (1982), that the States may tax federal contractors even if the burden of such taxes ultimately falls upon the United States.

equitable consideration supporting a conclusion that suit was barred. *Id.* at 759.

California is entirely consistent with the decision of the court of appeals in this case. Unlike the present case, *California* involved a state tax that was not claimed to violate federal law. Thus, the issue in *California* was whether the Court should recognize a cause of action under federal common law permitting the United States to attempt to recover state taxes it claimed its contractor should not have been required to pay as a matter of state law. 507 U.S. at 752.

In contrast, the Tribe and the United States in this case established that Montana's taxes violated federal law, by undermining tribal sovereignty and frustrating the purposes of federal statutes. The Tribe and the United States further established that Montana's illegal taxes injured the Tribe seriously, by significantly reducing the revenue it obtained from its mineral resources. The relief granted to the Tribe is properly understood as an exercise of the broad equitable authority of the federal courts to remedy violations of federal law. The existence and breadth of that equitable authority is beyond debate. See, *e.g.*, *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399 (1946) ("Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief."); *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992) ("[in a] long line of cases * * * the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief").

Petitioners, however, incorrectly understand this case as one involving an independent cause of action for restitution, sounding in federal common law. Pet. 2, 13-18. Although the source of the request for relief has not always been precisely specified during the course of these protracted proceedings, there can be no serious question that the Tribe and the United States sought to invoke the remedial authority of the federal courts to remedy a violation of federal rights. See, *e.g.*, Pet. App. 253 (in fourth amended complaint, Tribe indicates that it seeks "restitution and equitable relief," and that its claim for that relief arises from provisions of federal law violated by Montana's illegal taxes); *id.* at 74-85 (in rejecting Montana's claim that Tribe's request for restitution was solely matter of state law, district court states that "[h]aving established a violation of significant tribal interests based upon treaty and federal law, this Court has broad equitable powers to construct a remedy patterned after a state common law remedy").

In sum, petitioners' claim that the decision of the court of appeals conflicts with this Court's decision in *California* reflects a "misunderstanding over the difference between a cause of action and the relief afforded under it." *Franklin*, 503 U.S. at 69. When that misunderstanding is corrected, petitioners' claim of conflict evaporates.[9] *California*'s refusal to recog-

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[9] A similar misunderstanding is exhibited by the brief filed by *amici curiae* in support of the petition (at 1). There, *amici* claim that the ruling of the court of appeals means that any person suffering injury as a result of an unlawful state tax imposed on a third party would have a cause of action under federal common law for recovery of the taxes paid by the third party. The holding of the court of appeals suggests nothing of the sort. Rather, it simply reaffirms the broad equitable

nize a cause of action under federal common law in the circumstances before it (which involved only an alleged violation of state law) in no way conflicts with the ruling of the court of appeals granting the United States and the Tribe an equitable remedy with respect to an established violation of federal law.[10]

2. Petitioners also claim that the decision of the court of appeals conflicts with *Ute Indian Tribe* v. *State Tax Commission*, 574 F.2d 1007 (10th Cir.), cert. denied, 439 U.S. 965 (1978). That claim, too, is incorrect. In *Ute*, the Ute Tribe challenged the lawfulness of Utah's sales tax as applied to sales by a tribal enterprise located within a reservation. 574 F.2d at 1008-1009. The Tenth Circuit held that the

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authority of the federal courts to fashion remedies for violations of federal law.

[10] There are other significant distinctions between the present case and *California*. In *California*, the United States had voluntarily chosen to indemnify its contractor for state taxes, while in the present case Montana's illegal coal taxes were imposed over the Tribe's opposition. In *California*, the United States had failed to take advantage of administrative and state court proceedings in which it could have contested the legality of the state tax at issue, and had waited for years after the taxes were demanded to seek relief in federal court. 507 U.S. at 751, 756-759. In contrast, the Tribe in the present case promptly challenged the legality of Montana's coal taxes in the appropriate forum. Finally, in *California*, the United States was seeking relief not in its sovereign capacity, but rather simply in virtue of its contractual arrangements with a private party. *Id.* at 757. In the present case, the Tribe is seeking relief from illegal coal taxes that were found to have "impermissibly eroded the Tribe's sovereign authority." Pet. App. 6. These differences fully justify the court of appeals' observation that "*California* involved an entirely different factual situation" from that of the present case. *Id.* at 16.

tax was lawful as to sales to non-Indians but unlawful as to sales to Indians. *Id.* at 1009.

The Ute Tribe sought not only to enjoin the unlawful taxes, but also to obtain from the State the proceeds from the taxes that had been unlawfully imposed. 574 F.2d at 1009. The Tenth Circuit rejected the latter claim in a single paragraph, on the ground that the funds "were paid by the buyers of the goods and not by the sellers. If anyone can seek recovery or refund, it is these buyers." *Ibid.*

Ute differs from the present case in a critical respect: there is no suggestion in *Ute* that the sales tax at issue there had any adverse effect on the Ute Tribe as a whole. In contrast, in the present case, Montana's illegal coal taxes were imposed upon property owned by the Tribe, and were found to have substantially diminished the value of the property and the revenue the Tribe would otherwise have received from it. The Tenth Circuit's conclusion that the Ute Tribe could not recover illegal sales taxes paid by its individual members does not conflict with the remedy ordered by the court of appeals in the very different circumstances of the present case.

3. Petitioners claim that the ruling of the court of appeals presents important and novel issues meriting this Court's review. Pet. 19-21. To the contrary, the ruling of the court of appeals reflects the application of well established general principles to the unique circumstances of the present case. Further review is not warranted.

There is nothing novel about the court of appeals' exercise of equitable authority to require petitioners to surrender the proceeds of their illegal taxes. See *Ward* v. *Board of County Commissioners*, 253 U.S. 17, 21-24 (1920) (federal courts may order return to

Indians of proceeds from state taxes illegally derived from Indian property); see also p. 16, *supra*. Nor was it novel for the court of appeals to conclude that its equitable authority extended beyond the technical contours of common law rights of recovery such as assumpsit or constructive trust. Rather, as this Court stated in *Board of County Commissioners* v. *United States*, 308 U.S. 343, 350 (1939), "federal courts [are not] restricted to the remedies available in state courts in enforcing * * * federal rights."

Finally, the court of appeals appropriately exercised its equitable authority in the present case, and in any event further review is not warranted. The court of appeals required petitioners to surrender the proceeds of their illegal taxes to the Tribe because

> Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

Pet. App. 12. Essentially, the court of appeals concluded that, but for Montana's illegal taxes, the Tribe would have received substantially greater benefits from its coal, whether in the form of royalties or in the form of the severance tax it had unsuccessfully attempted to impose upon Westmoreland. *Id.* at 11-12. That fact-specific conclusion is amply supported by the record. See, *e.g.*, Pet. App. 30, 96-100 (detailing evidence supporting conclusion that Montana's coal taxes deprived Tribe of royalty revenue); C.A. E.R. 12 (when Tribe sought to renegotiate its lease with Westmoreland, Westmoreland took position that "any

additional payment to the Tribe would have to be in lieu of, rather than in addition to, the state tax").[11]

In any event, the decision of the court of appeals to provide the Tribe with an equitable remedy in the unusual circumstances of the present case does not merit this Court's further review. This Court has recognized that Montana's illegal coal taxes were "unique" and "extraordinarily high." *Cotton Petroleum Corp.*, 490 U.S. at 186 & n.17. Petitioners provide no persuasive reason to believe that the ruling in this case is likely to have sweeping implications of the kind they hypothesize.

4. To the extent that petitioners suggest that review is appropriate in light of the sums of money that may be involved, their concern is in significant part

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[11] Petitioners particularly challenge the court of appeals' suggestion (Pet. App. 11-12) that Westmoreland would have paid the Tribe's severance tax but for the existence of Montana's coal taxes. Pet. 7-8. It is true that Westmoreland successfully opposed imposition of the Tribe's tax, and the Department of the Interior for some years incorrectly refused to approve it. Pet. App. 31, 36. Petitioners overlook, however, the fact that Westmoreland's opposition to the Tribe's tax stemmed in significant part from its resistance to concurrent taxation. *Id.* at 31. In the absence of Montana's preexisting taxes, it is far from clear that Westmoreland would have resisted the Tribe's severance tax. In any event, that factual issue does not merit this Court's review.

More importantly, even if Westmoreland would not have paid the Tribe's tax had there been no Montana taxes, the decision of the court of appeals does not turn on that point. The court of appeals also held that the existence of Montana's coal taxes reduced the royalties that the Tribe could charge (Pet. App. 11), and petitioners do not identify any barrier that would have prevented the Tribe from obtaining higher royalties had Montana's taxes not been in place.

premature. Although the court of appeals has conclusively determined the question of petitioners' liability for the illegal taxes they collected, it remains for the district court on remand to determine whether to award prejudgment interest, and if so in what amount. Pet. App. 12. Cf., *e.g.*, *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (citing cases).

More importantly, the relief accorded to the Tribe simply requires petitioners to surrender the proceeds of their illegal taxes. The substantial amount of money involved reflects the "extraordinarily high" taxation rates that petitioners unlawfully imposed upon the Tribe's coal, and petitioners are not well placed to complain that it would be inconvenient for them to return proceeds to which they were never entitled.[12]

5. The Tribe's conditional cross-petition does not warrant review, even if the Court were to grant the principal petition. The court of appeals' ruling that the Tribe was not entitled to recover damages in connection with the failed Shell lease rests on the factual conclusions of that court and the district court that the coal taxes did not cause the failure of that lease. Pet. App. 12-14, 54-56. Those factual

[12] Montana's claims about the adverse fiscal consequences of the ruling of the court of appeals are also exaggerated, given that Montana's coal trust fund, into which it deposited a significant portion of the proceeds of the illegal severance tax at issue in this case, was valued at over $500 million in 1993. Pet. App. 25.

conclusions do not merit further review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

There is no merit to the Tribe's claim that the holding of the court of appeals conflicts with decisions of this Court that have in certain contexts eased plaintiffs' burden of proving causation and damages. Cross-Pet. 13 (citing *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)). First, the Tribe exaggerates the force of the rule articulated in *Bigelow*. Although the Tribe suggests that *Bigelow* requires that the burden of proof on questions of causation and damages be shifted to the defendant (Cross-Pet. 17), this Court has made clear that *Bigelow*'s effect is much more limited. See *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) (*Bigelow* establishes that after antitrust plaintiff establishes violation, plaintiff's "burden is to some extent lightened").

The Tribe also overstates the sweep of the *Bigelow* rule. *Bigelow* does not, as the Tribe suggests, reflect a general lightening of the burden of proof borne by plaintiffs on issues of causation and damages. Rather, it applies principally in contexts in which the injury to the plaintiff is of a kind that makes proof of damages particularly difficult. See, *e.g.*, *Chrysler Motors*, 451 U.S. at 566 ("Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land.").

It is not at all clear that such a rule must be applied to the relatively straightforward causation question at issue in this case, *i.e.*, whether the breakdown in

the relationship between Shell and the Tribe was caused by Montana's coal taxes or by other factors. The Tribe has not identified any decision that conflicts with the court of appeals' conclusion that the *Bigelow* rule did not apply to that causation question.[13]

Finally, the decision of the court of appeals does not conflict with *Mills*, 396 U.S. at 375. In *Mills*, the Court held that a stockholder challenging a merger on the ground that it was accomplished through use of a materially false proxy statement need not prove that the proxy statement caused the favorable vote of the stockholders. *Id.* at 381-386. The holding in *Mills*, however, turned in significant part on the conclusion that such an approach was necessary to effectuate a congressional purpose to ensure that shareholder votes were informed. *Id.* at 385. In the present case, there is no analogous congressional purpose relating to fair process. The court of appeals properly found that *Mills* was inapposite.

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[13] The court of appeals was not correct, however, to suggest categorically that the *Bigelow* rule does not apply to issues of causation. As the Tribe points out (Cross-Pet. 18-22), the *Bigelow* rule has been applied in certain contexts to issues of causation. This overstatement by the court of appeals was not essential to the outcome of the case, however, and provides no basis for review by this Court. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions").

CONCLUSION

The petition for a writ of certiorari in No. 96-1829 and the conditional cross-petition for a writ of certiorari in No. 96-1984 should be denied.

Respectfully submitted.

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No. 96-1829

In The

Supreme Court of the United States

October Term, 1996

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

CROW TRIBE OF INDIANS; and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Respondents find unremarkable, and unworthy of review, a judgment requiring a State and a local government to refund taxes, which they are legally entitled to keep as against the actual taxpayer, to third parties because a court determines that equity would be served by the refund. In respondent United States' words, "[t]here is nothing novel about the court of appeals' exercise of equitable authority to require petitioners to surrender the proceeds of their illegal taxes." Brief for United States in Opposition ("U.S. Opp'n") at 19.

Nonetheless, the reasoning and result below are not only unprecedented but also in direct conflict with a decision issued only four years ago by this Court, *United States v. California*, 507 U.S. 746 (1993), and the Tenth Circuit's opinion in *Ute Indian Tribe v. State Tax Commission*, 574 F.2d 1007 (10th Cir.), *cert. denied*, 439 U.S. 965 (1978). It consequently comes as no surprise that neither respondent Crow Tribe nor the United States chooses to discuss the salient aspects of *California* and that the respondents largely abandon the theory of recovery they advanced prior to *California*'s issuance: a common law claim in assumpsit for quasi-contract relief. They instead contend that the Ninth Circuit's ruling merely exemplifies the exercise of a federal court's "equitable powers to correct wrongs inflicted on plaintiffs due to invasions of their federally secured rights." Brief for Crow Tribe in Opposition ("Crow Opp'n") at 18. Respondents' concept of essentially standardless remedial authority ignores the need to establish a viable cause of action before *any* relief may be awarded and merely underscores why the Ninth Circuit's judgment warrants review.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH *CALIFORNIA*.

A. *California* Did Not Turn on Whether the Taxes Were Invalid Under Federal or State Law.

The Tribe and the United States distinguish *California* on the ground that the issue there "was whether the Court should recognize a cause of action under federal common law permitting the United States to attempt to recover state taxes it claimed its contractor should not been required to pay as a matter of state law." U.S. Opp'n at 16; *see also* Crow Opp'n at 19-20. Both respondents then focus their discussion on that portion of *California* refusing to find a right of subrogation free of compliance with state limitation requirements. Crow Opp'n at 20-21, 25; U.S. Opp'n at 15-16, 18 n.10.[1] The aspect of *California* relevant here, however, is the analysis addressing the absence of a common law claim lying in quasi-contract, and respondents entirely ignore that analysis. In *California*, this Court held that where, as here, the actual taxpayer relinquished the right to recoupment, the

[1] In its subrogation analysis, this Court reasoned that " 'the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assigner, which public policy does not forbid.' " *California*, 507 U.S. at 758 (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 142 (1938)). Neither the Tribe nor the United States has claimed here to be proceeding in Westmoreland's stead; rather, they have sued in their own sovereign capacities, as the United States had in *California* with respect to the quasi-contract, but not the subrogation, claim. *See California*, 507 U.S. at 757-58. The United States' suggestion (U.S. Opp'n at 18 n.10) that the quasi-contract claim in *California* was maintained derivatively of the contractor's rights refers to the Court's discussion of the subrogation issue, not to the earlier quasi-contract analysis.

Government had no federal common law cause of action in quasi-contract. The Court's holding did not turn on whether the taxes were illegal under federal or state law, and it controls this case.

In seeking to distinguish *California*, respondents do not indicate why the *quasi-contract* standards applied by this Court in rejecting the United States' claim in *California* should differ simply because the challenge to the Montana taxes arose under federal rather than state law. *See* Pet. at 16. Indeed, the United States itself argued in *California* that "[t]he court of appeals erred in suggesting . . . that the fact the federal claim is for recovery of taxes that are unlawful under state law, rather than under federal law, is of relevance to this case," since "[t]he federal cause of action for money had and received applies whenever federal funds have been 'wrongfully, erroneously, or illegally paid.' " Brief for United States at 24, *United States v. California*, *supra* (No. 91-2003). Although this Court ultimately rejected the United States' theory with respect to existence of a viable quasi-contract claim, it did so not because the alleged infirmity in the California tax was state law-based but because the Government could not recover in quasi-contract taxes imposed on another.

Reflective of the respondents' failure to come to grips with *California*'s quasi-contract analysis is their reliance on plainly inapposite decisions to justify the Ninth Circuit's decision. Crow Opp'n at 23-24; U.S. Opp'n at 16. Tellingly, none involved a quasi-contract claim. This Court's decision in *Snepp v. United States*, 444 U.S. 507 (1980), stressed by the Tribe, presented the question whether a constructive trust should be imposed on royalties received by a former Central Intelligence Agency agent from a book whose publication violated his employment contract with the CIA. The Court concluded

that a constructive trust was proper in view of the high level of trust reposed in the employee, which rendered his breach of contract a breach of trust, and the absence of any other meaningful remedy. *Id.* at 514-16. No less unhelpful are the cases alluded to in passing by the United States: *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), which found statutory authority under section 205(a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 53, to require restitution to tenants of rents in excess of permissible amounts; and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), which held that Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, did not evince a congressional intent to preclude an award of damages in connection with a sexual harassment claim brought under the statute. Respondents necessarily go so far afield because the one case directly on point, *California*, is so contrary to their position.

B. Under the Circumstances Here, Federal Remedial Authority Must Be Exercised Within the Boundaries of Established Quasi-Contract Principles.

Because recovery of Westmoreland's tax payments in general, and the Ninth Circuit's decision in particular, are insupportable under the quasi-contract principles applied in *California*, respondents alter the theory underlying their claim. The United States thus states that "petitioners' claim that the decision of the court of appeals conflicts with this Court's decision in *California* reflects a 'misunderstanding over the difference between a cause of action and the relief afforded under it.' " *Id.* at 17.

It is respondents, not petitioners, who confuse the existence of a cause of action with the authority of a federal court to award relief once a claim has been

proven. In their view, the "cause of action" here is the determination that the Montana severance and gross proceeds taxes are preempted by federal law. Crow Opp'n at 21; U.S. Opp'n at 14-15. They accordingly attempt to justify the Ninth Circuit's judgment on the assertion that a federal court possesses virtually unconstrained discretion to fashion whatever equitable remedies it feels accomplishes its sense of a just result once a federal law violation is established.[2] However, as this Court stated in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 63 (1975), even when a federal right is shown to have been violated, "it by no means follows that the plaintiff . . . is relieved of the burden of establishing the traditional prerequisites to relief." Put otherwise, "the conclusion that a private litigant could maintain an action for violation of [a federal statute] mean[s] no more than that traditional remedies [are] available to redress any harm which he may have suffered; it provide[s] no basis for dispensing with the showing required to obtain relief." *Id.*; *accord Deckert v. Independent Shares Corp.*, 311 U.S. 282, 288-89 (1940); *cf. Heck v. Humphrey*, 512 U.S. 477 (1994) (sufficiency of claim under 42 U.S.C. § 1983 alleging that defendants engaged in various forms of misconduct by pursuing prosecution must be resolved with reference to common law malicious prosecution standards).

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[2] Respondents assume the restitution relief ordered by the court of appeals is equitable in nature. Crow Opp'n at 17; U.S. Opp'n at 19. However, a claim lying in assumpsit for money had and received is an action at law. *See generally* I George E. Palmer, *Law of Restitution* § 1.3, at 9 (1978). That assumption can be indulged for instant purposes since, "[i]n substance, the principles underlying restitution, whether at law or in equity, are much the same." 5 *Moore's Federal Practice* ¶ 38.24[2], at 38-207 (1994).

The "cause of action" here is respondents' claimed entitlement to $58.2 million in taxes paid to the petitioners by Westmoreland. That those taxes were paid pursuant to statutes subsequently held preempted does not "dispens[e] with the showing required to obtain relief," and the elements of the required showing are furnished by the theory identified in respondents' amended complaints: assumpsit for money had and received or, in more modern terms, quasi-contract. Pet. App. 243, 252. One of those elements is the taxes' preemption, but, contrary to the effective position of respondents, the mere fact of preemption does not authorize a federal court to direct "disgorgement" of taxes admittedly held lawfully as against the actual taxpayer. *See* Crow Opp'n at 6. The propriety of the relief sought by respondents instead must be measured against common law standards governing quasi-contract actions, and "it is open to the defendant to show any state of facts which, according to those standards, would deny the right." *Stone v. White*, 301 U.S. 532, 535 (1937). The controlling standards were applied in *California* and cannot be squared with the result below.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *UTE*.

Respondents see no conflict with *Ute* because of supposed factual differences, including the Montana taxes' amount, their impact on the Tribe's income, and their "impos[ition] upon property owned by the Tribe." U.S. Opp'n at 19; *accord* Crow Opp'n at 27-28. The first two of these alleged distinctions, as discussed below in connection with the broad implications of the Ninth Circuit's decision, do not provide a ready basis to differentiate this matter from *Ute* or any other case where preemption is found. The third distinction is similarly nonexistent, since

the legal incidence of the Montana taxes fell on the act of severance by Westmoreland, not on the Tribe's property (Pet. App. 178-80), and therefore was indistinguishable from the legal incidence of the Utah tax which fell on the act of buying personal property or goods from the tribal enterprise (*Ute*, 574 F.2d at 1008).

Ute embodies the traditional rule that tax payments may be recovered by taxpayers, not third-party strangers to the relationship between the taxing government and the taxpayer. *California*, in turn, made explicit that this basic precept could not be evaded by employing quasi-contract principles. The Ninth Circuit's decision departs dramatically from the accepted rule and thereby runs squarely counter to the Tenth Circuit's ruling. Whatever the factual differences between the cases, they do not obscure this fundamental conflict.

III. THE NINTH CIRCUIT'S STANDARDLESS APPROACH TO DETERMINING QUASI-CONTRACT CLAIMS BY NONTAXPAYERS HAS FAR-REACHING IMPLICATIONS FOR THE ORDERLY ADMINISTRATION OF STATE TAX STATUTES.

Respondents discount the contention that the Ninth Circuit's opinion departs radically from accepted quasi-contract principles and characterize the lower court's holding as "a fact-specific conclusion . . . amply supported by the record." U.S. Opp'n at 20; *accord* Crow Opp'n at 15. Reduced to its essentials, the "fact-specific" qualities seized upon by respondents are the " 'extraordinarily high' " nature of the Montana taxes and the fact that the taxes had a negative impact on the royalties the Tribe could obtain or taxes it could impose. Crow Opp'n

15-16; U.S. Opp'n at 21.[3] They do not explain why these factors dictate quasi-contract recovery of Westmoreland's taxes but not recovery of third-party taxes whenever a state tax has been held preempted.[4]

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[3] The Tribe also suggests that the taxes had a "devastating impact on [its] mineral wealth." Crow Opp'n at 16. The record does not support this suggestion. *See* Pet. App. 100 (conclusion in *Crow II* that "Montana has failed to rebut evidence that the taxes had at least *some* negative impact on the coal's marketability") (emphasis supplied); *id.* 54-57 (COL ¶¶ 36-46) (district court's conclusions rejecting claim that the state taxes were a causative factor in Shell Oil Company's failure to develop the Youngs Creek Mine).

[4] The Tribe points to the Ninth Circuit's statement that "Westmoreland was willing to pay coal taxes to the Tribe as early as 1976" (Pet. App. 12) as supporting recovery of Westmoreland's state tax payments. Crow Opp'n at 21 n.13. The factual problem with such reliance is twofold, since the Tribe did not have a tax in place during the 1976-82 period because the Secretary of the Interior had disapproved application of the 1976 tribal severance tax to ceded strip mining and since Westmoreland would have refused to pay any such tax without secretarial approval. Pet. App. 31 (FOF ¶ 31), 51 (COL ¶ 30). The legal problem is that Westmoreland's willingness or unwillingness to pay a tribal tax did not establish any quasi-contractual obligation on petitioners' part to pay over to the Tribe or the United States state taxes Westmoreland paid without protest, any more than "California's demand that WBEC pay what California believed to be a lawful debt [made] California legally responsible for the Government's indemnification of WBEC." *California*, 507 U.S. at 756. The United States adopts a different tack, suggesting that, regardless of whether Westmoreland would have paid a nonexistent tribal tax, it would have paid higher royalties. U.S. Opp'n at 21 n.11. Aside from the absence of any showing as to how much more in royalties Westmoreland supposedly would have paid, this alternative theory of quasi-contract recovery is compromised for the same reason as the Tribe's. In sum, respondents cannot use quasi-contract recovery to compensate for the Secretary's

The reason for the lack of an explanation is that there is none. The very determination that a state tax's imposition on a nonmember is preempted carries with it a determination that tribal interests, which invariably include an economic component, have been prejudiced. *See, e.g., Ramah Navajo Sch. Bd., Inc. v. Bureau of Rev.*, 458 U.S. 832, 842 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150 (1980). At bottom, therefore, respondents propose, and the Ninth Circuit's decision supports, recognizing a federal common law theory of recovery of the type sought here whenever a state tax is held preempted. In the area of Indian law, where challenges to an assortment of state taxes are commonplace and the preemption standards are – at least on the lower court levels – less than precise in application,[5] the ramifications of respondents' theory are significant and virtually certain to spawn a new category of high stakes litigation. As the briefs filed in support of the petition by the seventeen amici curiae States and the Multistate Tax Commission further indicate, the implications of the Ninth Circuit's ruling extend far beyond challenges by tribes with or without the United States' support. In practical terms, the decision below means that States

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action on one hand or, on the other, the Tribe's inability to arrive at a mutually agreeable royalty arrangement that would have created an incentive for Westmoreland to seek recovery of its state tax payments consistently with Montana law. *Cf. California*, 507 U.S. at 759 ("[n]othing in our decision prevents the Government from including in its contracts . . . a contract term that likely would remove any disinterest a contractor may have toward litigating in state court").

[5] *See, e.g., Yavapai-Prescott Indian Tribe v. Scott*, No. 96-16416, 1997 U.S. App. LEXIS 15899 (9th Cir. June 30, 1997); *Gila River Indian Comm'y v. Waddell*, 91 F.3d 1232 (9th Cir. 1996).

have no assurance that, once taxes have been paid without available protest or other refund procedures being initiated by the taxpayer, those revenues may be expended without fear of future refund liability.[6]

CONCLUSION

The petition for writ of certiorari should be granted.

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[6] Since what is at issue is a federal common law claim capable of being asserted in federal or state court, the Tribe's contention that the United States' participation, and with it the absence of Eleventh Amendment immunity, renders this case sui generis is mistaken. Crow Opp'n at 16; *see* Brief of Amici Curiae States of California et al. at 1 ("under the Ninth Circuit's reasoning any nontaxpayer who has borne significant economic burden as a result of a state tax could use a federal common law quasi-contract cause of action in an attempt to challenge directly in state court the validity of that state tax (*e.g.*, claim a violation of the Commerce Clause) and, if successful, recover from the state all moneys paid by the actual taxpayer").

(3)

No. 96-1829

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; and MARTHA FLETCHER,
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v.
CROW TRIBE OF INDIANS; and UNITED STATES OF AMERICA,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALASKA, ARIZONA, FLORIDA, HAWAII, IOWA, MAINE, MICHIGAN, MINNESOTA, NEVADA, NEW YORK, NORTH DAKOTA, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, AND WYOMING IN SUPPORT OF STATE OF MONTANA, ET AL.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996
No. 96-1829

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; and MARTHA FLETCHER,
Petitioners,
v.
CROW TRIBE OF INDIANS; and UNITED STATES OF AMERICA,
Respondents.

INTEREST OF AMICI CURIAE

By improperly distinguishing *United States* v. *California*, 507 U.S. 746 (1993) (hereinafter "*California*") the Ninth Circuit creates uncertainty where this Court intended clarity. This uncertainty threatens every State's fisc, regardless of the presence or absence of Indian law questions and regardless of the presence or absence of the federal government or an Indian tribe as a plaintiff. For example, under the Ninth Circuit's reasoning any nontaxpayer who had borne significant economic burden as a result of a state tax could use a federal common law quasi-contract cause of action in an attempt to challenge directly in state court the validity of that state tax (*e.g.*, claim a violation of the Commerce Clause) and, if successful, recover from the state all moneys paid by the actual taxpayer. This reasoning is directly inconsistent with this Court's holding in *California* and could cause serious disruption of the *California* rule and considerable

fiscal damage to the States unless Montana's petition is granted and the Ninth Circuit's decision is reversed.

ARGUMENT

THE NINTH CIRCUIT'S FAILURE TO RESPECT AND FOLLOW THIS COURT'S 1993 HOLDING IN *UNITED STATES* v. *CALIFORNIA* SHOULD RESULT IN THE GRANTING OF THE PETITION AND THE PER CURIAM REVERSAL OF THE JUDGMENT.

In *United States* v. *California* 507 U.S. 746 (1993) (cited herein as "*California*"), the federal government sued California to recover taxes which a federal contractor, the taxpayer, had paid to California. Pursuant to contract the federal government had deposited funds into an account from which the taxpayer had paid the California taxes. Operating on the stated assumption that federal courts could entertain a federal common law action for the recovery of state taxes by the federal government (*id.* at 752), this Court held that the federal government had no cause of action against California for money had and received (also known as quasi-contract or *indebitatus assumpsit*). This Court based this holding on its determinations that (1) the federal government's contractual agreement to fund in advance the taxpayer's payments "does not make the Government's payments direct disbursements of federal funds to the State" (*id.* at 753) and (2) *California* was distinguishable from other cases in which, although plaintiff had not paid funds directly to defendant, a theft of plaintiff's funds by plaintiff's agent had resulted in the defendant's possession of the funds under circumstances wherein the defendant should be held responsible for the agent's actions (*id.* at

755-56). In its conclusion, this Court held that the federal government's "shouldering the 'entire economic burden of the levy'" did not give rise to a federal common law cause of action for money had and received. *Id.* at 759.

In the present case, the Ninth Circuit should have applied *California* to deny any relief to the Tribe and to the federal government acting on the Tribe's behalf. If any other remedy still applies to recover taxes when neither statutory remedies nor the principles of subrogation apply, that remedy is an action of assumpsit for money had and received. 507 U.S. at 751, 752. In *California*, where the federal government clearly had assumed the economic burden of the state taxes imposed on the contractor/taxpayer, this Court determined that no contract would be implied in law, and thus no cause of action for money had and received could lie, when a nontaxpayer plaintiff had neither directly disbursed funds to the state nor had its funds stolen and turned over to a defendant who could be held responsible for the theft. *Id.* at 753-56. Neither of these circumstances are present in the present case. In *California* this Court gave no indication that relief from its clear holding could be accomplished through the consideration of other "equitable considerations." See Petition Appendix (hereinafter "Pet. App.") 12.[1]

The Ninth Circuit's holding in the present case cannot be squared with this Court's holding in *California*. The

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1. The Ninth Circuit labels quasi-contract (money had and received) cases like *California* as cases purely in equity. See Pet. App. 8-9 n. 2. In actuality, they are cases which are legal in form but with equitable elements applicable to "very specific factual patterns." Dan B. Dobbs, Handbook on the Law of Remedies 236 (1973); see *California*, 507 U.S. at 756, 759 (money had and received cause of action is a "common law cause of action" which necessarily involves a contract implied "in law").

Court of Appeals' conclusion is based upon the assumption (with no proof as to amounts) that the Crow Tribe suffered an economic burden due to Montana's imposition of its taxes upon the mining company that had contracted for rights to mine tribal coal. This "economic burden" basis is derived from the Ninth Circuit's earlier holding that Montana's tax was preempted by federal law because it "had *at least some negative* impact on the coal's marketability" (Pet. App. 100; emphasis added). See Pet. App. 8 (*Crow Tribe IV*), citing to 969 F.2d at 848-49 (Pet. App. 59-60)(*Crow Tribe III*) and to 819 F.2d at 899 (Pet. App. 97) (part of *Crow Tribe II*'s preemption analysis). The Ninth Circuit's reasoning directly conflicts with *California*, where, despite the fact that the federal government bore the *entire* economic burden by funding its contractor's taxes in advance, this Court held that no money had and received cause of action existed. See 507 U.S. at 759.[2]

2. *United States* v. *Jefferson Electric Co.*, 291 U.S. 386, 402-03 (1934), not cited below, is unhelpful to the Tribe and the United States. There, this Court sustained against a due process challenge a federal revenue statute that retroactively imposed on a taxpayer the obligation to establish, as a condition of recovery, that the taxpayer had borne the tax's burden or, if the burden was passed on to purchasers, that the taxpayer had either repaid the purchasers or agreed through posting a surety bond to reimburse the purchasers. In the present case the taxpayer was to pass the burden of the taxes onto its utility customers, not the Tribe (Pet. App. 30 (FOF 44)), and nothing precluded the taxpayer from seeking recovery of Montana's coal taxes. In any event, in *Jefferson Electric* this Court did not provide any third party with an independent cause of action against the government; it merely upheld against a constitutional challenge a statute which permitted the interests of tax-reimbursement-paying purchasers to be protected in the *taxpayer's* action for money had and received. See also *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 46-47 (1990).

Faced with this inconsistency, the Ninth Circuit attempted to distinguish *California* on two invalid grounds: (1) in *California* the state had not fit within the third party thief exception to the direct disbursement rule and the courts had not determined that state itself had illegally collected taxes, while in this litigation Montana itself had already been established as a wrongdoer through its imposition of a preempted tax (Pet. App. 8-9 n. 2); (2) the facts were different in *California*, where the federal government "had *voluntarily* agreed to reimburse a contractor subject to state tax." Pet. App. 16 (emphasis in original).

The Ninth Circuit's first basis for distinguishing *California* makes no sense. The basic claim in *California*, as it was below, was that the State had illegally collected a tax. The fact that in this case the illegality had been established in an earlier opinion, while in *California* the lack of the federal cause of action prevented the courts from ever deciding the issue of whether the tax had been illegally collected, should make no difference. The effect of the holding in *California* is that, even were it assumed that California's tax collection had been illegal, the federal government as plaintiff could state no cause of action for money had and received against the State of California.[3]

The Ninth Circuit's second basis for distinguishing *California* fares no better than the first. Under *California*, and absent the exceptional facts involving the wrongdoing

3. Although properly not relied upon by the Ninth Circuit to distinguish the cases, another difference existed between the facts here and the facts in *California*: in *California* the tax was being challenged on state law grounds rather than federal law grounds. This difference is not material, for this Court has recognized that procedural requirements which protect a state tax from attack are not rendered ineffective by basing such an attack on federal constitutional grounds. See *McKesson Corp.*, 496 U.S. at 25 n. 4.

of a third party such as in *Bayne v. United States*, 93 U.S. 642 (1877), and *Gaines v. Miller*, 111 U.S. 395 (1884), a direct disbursement of funds from plaintiff to defendant is essential to the existence of a money had and received cause of action--a requirement the Court of Appeals perfunctorily noted but then dismissed without further substantive analysis. Pet. App. at 8-9. In *California*, the federal government had the next best thing, the clear and full economic burden of the government's having funded its contractor's tax payments through advance funding. Under this Court's holding in *California*, the next best thing to direct taxpayer payments was not good enough to give rise to a money had and received cause of action.

Here, the Ninth Circuit has predicated its holding that a money had and received cause of action existed against Montana on the basis of some indefinite, non-"negligible" injury (Pet. App. 100) suffered by the Crow Tribe in the form of lost coal marketability--a loss which says nothing about the appropriateness of implying a quasi-contractual obligation on Montana's part to refund to the Tribe *taxes* paid by Westmoreland Resources. In practical effect, therefore, the Court of Appeals' ruling has created under the guise of an action in *indebitatus assumpsit* a type of liquidated damages whose amount is measured by the taxes paid to Montana and Big Horn County. That holding, remarkable and unprecedented on its own terms, is directly contrary to the outcome in *California*, where the economic burden upon the unsuccessful nontaxpayer plaintiff was both undisputed and clearly ascertainable.

Finally, the Ninth Circuit's ruling will spawn litigation by nontaxpayers to recover taxes, which even the particular taxpayer is foreclosed from seeking, on the basis that the tax was invalid and caused injury on the complainant by virtue of its imposition on the actual taxpayer. Leaving the Court of Appeals' decision in place

would mean that States will never really know the bounds of their potential liability for tax refunds, since third parties may exist in the background with potential grievances that are unconstrained by the statutory requirements applicable to taxpayer actions. Such a result is plainly incompatible with this Court's unwavering recognition, in preserving the federal balance, of "[t]he States' interest in the integrity of their own [tax refund] processes" (*Arkansas v. Farm Credit Servs.*, No. 95-1918, __ U.S. __, 65 U.S.L.W. 4414, 4416 (June 2, 1997), and with the need for clear, certain rules governing recovery of monies that have been paid and thereafter devoted to carrying out governmental functions.

CONCLUSION

Under the "economic burden" theory adopted by the Ninth Circuit in the present case, the federal government would have prevailed in *United States* v. *California*. It did not. *United States* v. *California*, which cannot validly be distinguished from the present case, is binding here. Montana's petition for certiorari should be granted in order to avoid the generation of confusion and fiscal injury in an area in which this Court in *United States* v. *California* meant to settle the law. Because the Ninth Circuit's decision is directly inconsistent with recent precedent of this Court, it would be entirely appropriate, without further briefing on the merits, to grant Montana's petition, summarily reverse the judgment of the Ninth Circuit, and remand the case for further proceedings consistent with *California* and this Court's per curiam direction. See

Bibles v. *Oregon Natural Desert Ass'n*, __ U.S. __, 117 S. Ct. 795 (1997) (per curiam).

Dated: July 9, 1997.

Respectfully submitted,

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IN THE
Supreme Court of the United States
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STATE OF MONTANA; MARY BRYSON;
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Petitioners,

v.

CROW TRIBE OF INDIANS; and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of *Amicus Curiae* Multistate Tax Commission in Support of State of Montana

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BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF STATE OF MONTANA[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission ("Commission") joins *Amici* States of California *et al.* in urging that the Court review this matter. The Commission files its own brief to indicate its support of review being granted, because it is unable to join the brief of *Amici* State of California *et al.* (States represented by their Attorneys General are subject to different Court rules, Sup. Ct. Rules 37.4 and 37.6 (May 1, 1997), and at least one State participating in the Brief of *Amici* State of California *et al.* has a policy of not joining in any brief with *amici* other than States represented by their Attorneys General.)

The Commission views *Crow Tribe of Indians* v. *Montana*, 92 F.3d 826, *amended*, 98 F.3d 1194 (1996), with alarm. The decision departs from the established rule of *United States* v. *California*, 507 U.S. 746 (1993), by recognizing in effect a new cause of action in non-taxpayers. The decision allows non-taxpayers to pursue against a State a money damage claim for taxes paid by a third-party taxpayer who has released any claim to the taxes

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[1]No counsel for any party authored this brief in whole or in part, although the brief was submitted to counsel for Petitioner State of Montana who made comments that were considered in preparation of this brief. Only *Amicus* Multistate Tax Commission and its members States made any monetary contribution to the preparation or submission of this brief. Finally, this brief is filed pursuant to the consent of the parties.

paid, if the non-taxpayer has been economically injured by a State's constitutionally invalid tax.

The decision is a departure from previous understandings about remedies for unconstitutional taxes. *McKesson Corp.* v. *Florida Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), stated that unconstitutional taxation requires meaningful backward looking relief for the *affected taxpayer. Id.* at 31. The constitutional necessity for this kind of relief exists even in the presence of some sense that others may have borne some of the economic burden of the illegal taxes. *Id.* at 46-49. The Ninth Circuit's decision is sure to spawn lurking claims that will unjustifiably interfere with state taxation, a reserved right of sovereignty of the States to operate effectively in their own sphere of influence.

Interference with state tax sovereignty concerns the Commission, because it was founded out of the increased interest of Congress to regulate state taxation. The Commission itself is the administrative agency formed by the MULTISTATE TAX COMPACT, RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 751 (1994). Twenty-one States have adopted the MULTISTATE TAX COMPACT through State legislation. Sixteen additional States have ratified the goals of the Commission by joining as associate member States.[2]

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[2]The current full members are the States of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine (effective 09/19/97), Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems that followed the findings and recommendations of the Willis Committee. *See* Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N REV. 1, 1 and 23.[3] In recent times, growing from its historical concern over preserving a workable system of state taxes that is essential to the proper exercise of state sovereignty within our federal system, the Commission follows and participates in many federal level issues. The Commission's participation extends to federal legislative, executive, and judicial processes, when the issues presented have the potential to impact state tax sovereignty significantly.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED UNDER THE AUTHORITY OF *UNITED STATES* v. *CALIFORNIA* AND THE ACTION IN *ASSUMPSIT* FOR TAXES PAID BY A THIRD-PARTY NON-TAXPAYER THEREAFTER DISMISSED.

The Commission joins in the argument advanced by *Amici* State of California *et al.* in their brief filed in this matter.

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are the States of Arizona, Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin.

[3]The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate and foreign commerce.

II. THE PETITION SHOULD BE GRANTED TO PREVENT A NEW REMEDY FROM CAUSING MANY UNINTENDED AND UNJUSTIFIED CONSEQUENCES TO THE STATES' PROPER EXERCISE OF THEIR TAXING POWER.

Presumably a taxpayer has sufficient economic incentive in most circumstances to pursue a deprivation of a constitutional right by state taxation. Taxpayers under the decisions of this Court are even free to pursue their own economic interests to challenge state taxation, when the constitutional right in some sense may be said to rest in a sovereign and not the individual taxpayer. See *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 814-815 (1989) (private parties may challenge state taxes based upon the intergovernmental immunity of United States). The taxpayer is free to assert its full claim even in the face of evidence suggesting others may have borne some of the economic burden of the illegal taxes. *McKesson Corp.*, *supra* at 496 U.S. 46-49. And sovereigns United States and Indian Tribes are further protected in their own right by having clear authority to secure extraordinary relief (presupposing to some extent the inadequacy of a remedy at law and the serious risk of irreparable harm), when individual taxpayers may not have the capacity, level of interest, or incentive to preserve the sovereign's rights. See *Montana* v. *Crow Tribe of Indians*, 484 U.S. 997 (1988), *summarily aff'g*, 819 F.2d 895 (1987), (Tribe may secure declaratory and injunctive relief for taxes preempted by federal law and infringing on tribal sovereignty); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (same); *Department of Employment* v. *United States*, 385 U.S. 355 (1966) (United States, and/or its instrumentality

with joinder of the United States, may secure injunctive and declaratory relief for unconstitutional taxes).

In the face of these safeguards, it is surprising to find a circuit court now suggesting that sovereigns economically injured by a state tax system are additionally free to pursue a *quasi*-contract remedy against a State for taxes paid by another when the taxpayer has released any claim to the taxes paid. The consequences of this approach are intimidating.

The United States apparently could sue the States in the *Davis*, *supra*, circumstances for an award in the amount of the discriminatory taxes paid by the federal employees even when the injured federal employees had been totally satisfied for their discriminatory tax burden. This additional *legal* remedy, Dan B. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 236 (1973), appears unseemly in light of the apparent right the United States would have from the inception of the discriminatory tax to seek extraordinary declaratory and injunctive relief. After all, access to injunctive relief undoubtedly reflects some sense that the United States in matters of clashing sovereigns has no difficulty in meeting the two equitable requirements for this kind of relief—an inadequate remedy at law and serious risk of irreparable harm. *Pulliam* v. *Allen*, 466 U.S. 522, 537-38 (1984).

The electric utility customers of the coal operator in this case, the ones who contractually were to bear the burden of the tax, Pet. App. 30 (FOF 44)), could be pursuing the same claim that the Tribe is pur-

suing.[4] Similarly, the coal operator, assuming it had not settled with the State in this case, could pursue its own full right to receive the taxes it illegally paid without any reduction in its claim. This state of affairs will raise very difficult factual questions and increase the complexity of state tax refund litigation based upon deprivation of constitutional rights beyond its already its current lofty heights. *See McKesson*, *supra* at 496 U.S. 46-49.

If all these parties, including the Indian Tribe, have claims, then the court addressing a refund claim brought by only one will face a significant issue of determining how to proceed in the absence of the others. Issue preclusion can also become relevant. The court might face at some point a possible issue of apportionment among the competing injured parties with respect to any award. These issues which are substantial enough says nothing about considerations of State sovereign immunity at least with respect to claims that are not brought by the United States in its capacity as sovereign as opposed to derivative claims brought as a representative of the Indian Tribe.

States that do not provide monetary remedies to all injured parties for illegal taxes paid will face a new assault on the primacy of their state tax remedies. Clearly, these States will be challenged for not providing a "plain, speedy and efficient" remedy. TAX INJUNCTION ACT, 28 U.S.C. §1341 (1994).

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[4]In fact, while the public utilities in this case did seek to intervene, the District Court rejected this initiative and the denial was not further appealed. Clerk's Record 380.

These examples indicate that the Court should take a serious look at the additional *legal* remedy that has been provided to the Tribe and the United States in the latest round of this litigation. This case has significance far beyond the litigants and the solvency of Montana.

CONCLUSION

Unites States v. *California*, *supra*, clearly governs the proper disposition of this case. To allow the Ninth Circuit's decision in this case to stand without this Court's examination is to spawn a new genre of litigation whose actual consequences can only be identified through a tortuous period of avoidable litigation. The avoidance of litigation that would unnecessarily and adversely impact the proper functioning of state taxation, a core power of state sovereignty, is a compelling reason for the Court to review this matter.

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Order of Ninth Circuit Court of appeals denying Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc (filed February 21, 1997).....Pet. App. 228

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES*

July 13, 1978	Complaint in CV-78-110-BLG (D. Mont.) filed
Sept. 29, 1978	Second amended complaint filed
Oct. 5, 1978	Proposed answer of defendant-intervenor Westmoreland Resources, Inc. to second amended complaint, including counterclaim and crossclaim, filed
Apr. 3, 1979	Memorandum opinion and order granting defendants' motion to dismiss filed
Apr. 4, 1979	Judgment dismissing complaint filed
Apr. 24, 1979	Notice of appeal filed
July 13, 1981	Opinion of Ninth Circuit Court of Appeals in No. 79-4321 reversing district court's judgment filed
Jan. 5, 1982	Order amending opinion in No. 79-4321, denying petition for rehearing, and rejecting suggestion for rehearing en banc filed
June 14, 1982	Order denying petition for writ of certiorari in U.S. Sup. Ct. No. 81-1852 filed
Nov. 22, 1982	Third amended complaint in CV-78-110-BLG filed
Dec. 23, 1982	Answer of defendant-intervenor Westmoreland Resources, Inc. to third amended complaint, counterclaim and crossclaim filed

* The parties have summarized the entries made in the Clerk's Record for the Court's convenience.

Jan. 6, 1983	Order filed granting plaintiff preliminary injunction against enforcement of severance tax with respect to defendant-intervenor Westmoreland Resources, Inc. and directing Westmoreland to make future severance tax payments into court registry
June 6, 1983	Complaint of plaintiff-intervenor United States filed
Jan. 6, 1984	Final pretrial order filed
May 25, 1984	Order denying plaintiff's preliminary injunction against enforcement of gross proceeds tax filed
June 22, 1984	Memorandum opinion regarding denial of plaintiff's preliminary injunction against enforcement of gross proceeds tax filed
Sept. 10, 1985	Findings of fact, conclusions of law and order directing entry of judgment in defendants' favor filed
Sept. 11, 1985	Judgment filed
Sept. 25, 1985	Motion of defendant State of Montana for release of deposited severance tax payments filed
Sept. 25, 1985	Motion of plaintiff-intervenor United States for rehearing and to alter or amend judgment filed
Mar. 12, 1986	Order filed denying defendant State of Montana's motion for release of deposited funds and plaintiff-intervenor United States' motion for rehearing and to alter or amend judgment

May 6, 1986	Notice of appeal by plaintiff-intervenor United States filed
May 7, 1986	Notice of appeal by plaintiff filed
June 11, 1987	Opinion of Ninth Circuit Court of Appeals in Nos. 86-3842 and 86-3845 filed
Nov. 25, 1987	Order in CV-78-110-BLG granting motion of defendant-intervenor Westmoreland Resources for leave to make gross proceeds tax payments into Court Registry and for protection against adverse claims filed
Dec. 2, 1987	Memorandum opinion and order in CV-78-110-BLG providing for payment of gross proceeds tax payments into Court Registry and for protection against adverse claims filed
Jan. 11, 1988	Order in U.S. Sup. Ct. No. 87-343 affirming judgment of Ninth Circuit Court of Appeals in Nos. 86-3842 and 86-3845 filed
June 9, 1988	Memorandum opinion and order in No. CV-78-110-BLG denying motion of Westmoreland's utility customers for leave to intervene filed
July 11, 1988	Memorandum opinion and order denying Westmoreland's motion to amend its answer opposing plaintiff's motion for release of funds in Court Registry filed
Sept. 19, 1988	Judgment awarding funds in court registry to United States in trust for Crow Tribe filed

Oct. 11, 1989	Fourth amended complaint for restitution filed
Dec. 26, 1990	Memorandum opinion and order denying defendants' motion to dismiss fourth amended complaint filed
Dec. 26, 1990	First amended complaint of plaintiff-intervenor United States filed
May 29, 1991	Opinion and order of certification for interlocutory appeal under 28 U.S.C. § 1292(b) filed
July 17, 1991	Order by Ninth Circuit Court of Appeals in No. 91-35682 granting permission to appeal under 28 U.S.C. § 1292(b) filed
July 23, 1992	Order dismissing appeal in No. 91-35682 filed
Oct. 22, 1993	Stipulation and order in CV-78-110-BLG dismissing defendant-intervenor Westmoreland Resources, Inc.'s crossclaim and counterclaim and dismissing Westmoreland as party filed
Apr. 18, 1994	Amended final pretrial order filed
Nov. 23, 1994	Findings of fact, conclusions of law, order directing judgment in defendants' favor, and judgment filed
Jan. 19, 1995	Notice of appeal by plaintiff filed
Jan. 19, 1995	Notice of appeal by plaintiff-intervenor United States filed
June 12, 1995	Order by Ninth Circuit Court of Appeals granting motion of appellees to consolidate appeals in Nos. 95-35093 and 95-35096 filed

Aug. 6, 1996	Opinion of Ninth Circuit Court of Appeals reversing District Court's judgment filed
Sept. 18, 1996	Petition for rehearing with suggestion for rehearing en banc of appellees received
Sept. 20, 1996	Petition for rehearing of appellant Crow Tribe received
Oct. 29, 1996	Order recalling mandate filed, accepting for filing appellees' petition for rehearing received on September 18, 1996, and amending opinion
Nov. 21, 1996	Order denying petition for rehearing of appellant Crow Tribe filed
Feb. 21, 1997	Order denying petition for rehearing and rejecting suggestion for rehearing en banc of appellees filed

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

CONTRACT NO. 1420-0252-4088
(Tract 3, Sale 3)

AMENDED
COAL MINING LEASE INDIAN LANDS

Coal Mining Lease Crow Reservation.

THIS INDENTURE OF LEASE is made and entered into on this 26th day of November, 1974 between the CROW TRIBE OF INDIANS OF THE CROW RESERVATION, of Crow Agency, State of Montana, Party of the First Part, hereinafter called Lessor, and WESTMORELAND RESOURCES, a partnership, of Billings, Montana, Party of the Second Part, hereinafter called Lessee, for the purpose of amending that certain Coal Mining Lease Indian Lands entered into between the parties on June 6, 1972. This lease shall have the effect of ratifying the June 6, 1972, lease and in addition amending the same in its entirety to read as follows.

WITNESSETH:

I. Lessor, in consideration of $1.00, receipt of which is hereby acknowledged, of the rent and royalty to be paid, and of the agreement of the lessee herein contained, as well as execution by the parties of the Settlement Agreement attached hereto as Exhibit "B" and made a part hereof and execution by the parties of the Land Purchase Agreement attached hereto as Exhibit "C" and made a part hereof, grants and leases unto lessee for the

sole purpose of mining coal on the land described as follows:

> See Exhibit "A" attached hereto and by this reference made a part hereof.

Crow Reservation, Big Horn County, State of Montana, and containing 14,745.92 acres, more or less. The lessee may occupy as much of the surface of the land as is necessary to carry on the work of exploring for, developing, mining, producing, processing, marketing and removing said coal, including milling and storing subject to payments to be made as hereinafter set forth. Subject to the limitations hereinafter provided, with particular reference to the provisions contained in paragraph 6 f. of this lease, lessee shall have the right and license in connection with the operation of mining on the lands to construct thereon buildings, pipelines, plants, tanks, and other structures used or useful in the production, processing, and transportation of said coal; make excavations, openings, stockpiles, dumps, ditches, drains, roads, railroads, spur tracks, transmission lines, and other improvements used or useful in said production, processing, and transportation; produce electrical power for its own use, erect and operate pipelines, place machinery and other equipment and fixtures upon the lands; use and transport water developed by lessee on the lands and any other water made available to lessee; prepare for market, remove, process, and sell coal; do all other things upon said leased premises that may be necessary in the efficient operation of the leased premises for the purposes permitted hereunder, and occupy so much of the surface of the leased lands as may be necessary to carry on the mining operations hereunder, including the right

of ingress and egress; however, the rights contained herein do not include the right to dump waste materials or tailings from properties not included in this lease.

II. TERM. This lease is for a term of 10 years from June 14, 1972, and as long thereafter as coal is produced in paying quantities.

III. Definition. Secretary refers to the Secretary of the Interior or his authorized representative. Area Director refers to the official in charge of the Billings Area Office, Billings, Montana. Superintendent refers to the official in charge of the Crow Indian Agency, Crow Agency, Montana. Supervisor refers to the Regional Mining Supervisor, U. S. Geological Survey.

IN CONSIDERATION OF THE FOREGOING, THE LESSEE AGREES:

1. ROYALTY.

a. *General Royalty Provisions.* For purposes of this Section 1, ROYALTY, the coal in and under the leased premises is divided into portions.

I. The first portion is 77 million tons of coal which the lessee has agreed to sell to Northern States Power Company, Dairyland Power Cooperative, Interstate Power Company, and Wisconsin Power & Light Company pursuant to coal sales agreements dated June 15, 1972.

The lessee will pay a royalty to the Superintendent, for the use and benefit of the lessor, on or before the twenty-fifth day of each calendar month during the term hereof on all such coal mined and shipped from the leased premises during the preceding calendar month. The amount of such royalty shall be as follows:

(a) For coal mined and shipped during the calendar years 1974 and 1975, the greater of either 25¢ per ton for each ton of 2,000 pounds of coal or an amount per ton for each ton of 2,000 pounds of coal equal to 6% of the F.O.B. mine price per ton;

(b) For coal mined and shipped during the calendar years 1976 and 1977, the greater of either 30¢ per ton for each ton of 2,000 pounds of coal or an amount per ton for each ton of 2,000 pounds of coal equal to 6% of the F.O.B. mine price per ton; and

(c) For coal mined and shipped during the calendar year 1978 and all years thereafter, the greater of either 35¢ per ton for each ton of 2,000 pounds of coal or an amount per ton for each ton of 2,000 pounds of coal equal to 6% of the F.O.B. mine price per ton.

II. The second portion of coal is the balance of the coal covered by this lease. The lessee will pay a royalty to the Superintendent, for the use and benefit of the lessor, on or before the twenty-fifth day of each calendar month during the term hereof on all such coal mined and shipped from the leased premises during the preceding calendar month. The amount of such royalty shall be the greater of either 40¢ per ton for each ton of 2,000 pounds of coal or an amount per ton for each ton of 2,000 pounds of coal equal to 8% of the F.O.B. mine price per ton.

b. *Renegotiation of Royalty.* The royalty rate provided for in subparagraph 1 a. II of this lease shall become subject to renegotiation every ten years beginning ten years after the date hereof. Negotiations shall commence not less than 120 days prior to the end of each

such ten year period. Both parties shall negotiate in good faith and neither party shall utilize such renegotiations to attempt to terminate this lease. Neither party shall request a royalty rate clearly above or below the rate then being paid and received for coal of like grade, quality and approximate quantity mined in Montana, North Dakota and Wyoming. If an agreement on royalty has not been reached on or before the beginning of any ten year period, the dispute shall be submitted to arbitration as provided in paragraph 29 of this lease, and the decision of the arbitrators shall be final and binding on the parties and retroactive to the first day of the new ten year period.

c. *Additional Bonus and Advance Royalty.* Following execution by both parties of this lease and all attached Agreements and approval of this lease and the attached Agreements by the Secretary of the Interior the lessee shall immediately pay to the Superintendent for the use and benefit of the lessor the sum of $1,128,000.00. $500,000.00 of the foregoing amount shall be treated as bonus and shall not be recoverable by the lessee. $628,000.00 of the foregoing amount shall be treated as an advance royalty and may be recovered by the lessee by crediting the sum of $8,333.33 to the production royalties payable by the lessee in January of 1985 and each calendar month thereafter until the entire $628,000.00, without interest, has been recovered by the lessee.

d. *Advance Minimum Royalty.* The lessee will pay, or cause to be paid to the Superintendent, Crow Indian Reservation, Crow Agency, Montana, for the use and benefit of the lessor on June 14, 1975, an advance minimum royalty of $2.00 per acre per year and on June 14, 1976, and each June 14 thereafter until the end of the

development period as defined in paragraph 5 of this lease an advance minimum royalty of $5.00 per acre per year. The advance minimum royalty paid pursuant to this subparagraph will apply as a credit only against production royalties payable on account of coal mined and shipped from the leased premises during the twelve month period immediately following the date of payment of such advance minimum royalty.

e. *Protection of Royalty Where There is Captive Coal.* Where coal is mined from the leased premises and is not sold or shipped, but is consumed by the lessee, the lessee shall pay the greater of either 40¢ per ton for each ton of 2,000 pounds of coal mined, or an amount per ton for each ton of 2,000 pounds of coal equal to 8% of the F.O.B. mine price per ton. For purposes of computing the percentage royalty under these circumstances or under those circumstances where the coal is not sold pursuant to an arms length sales contract, the lessor and the lessee shall agree on the basis for constructing the F.O.B. mine price of such coal. If the parties fail to agree, then either party may demand that the matter be submitted to arbitration in the manner provided in subparagraph 29 of this lease.

f. *Protection of Royalty for Commingled Coal.* The lessee shall have the right to commingle coal mined under this lease with other coal, and the lessee shall determine at the end of each calendar month by survey the volume of coal mined from the leased premises and from other sources. For purposes of calculating royalty, the tonnage mined and shipped from the leased premises shall be determined by applying to the total coal mined and shipped from the mine that percentage of the total

volume, determined by survey, to have been removed from the leased premises.

g. *Measure of Quantity for Royalty Payment.* The quantity of all coal mined by the lessee shall be determined by railroad or truck scales, belt weightometers, or other means mutually agreed upon.

h. *Protection of Royalty Through Submission of Records.* The lessee will perform such work on said premises as may be necessary to establish boundaries and control, and will keep or cause to be kept at the mine up-to-date, clear, accurate and detailed maps or drawings of workings made by the lessee, which maps and drawings shall be available for inspection by the lessor at all reasonable times. Copies or reproductions of current maps and drawings of the leased premises as aforementioned shall be furnished to the lessor semi-annually. The lessee will also furnish to the lessor copies of all drill hole records, including logs of the holes, and analyses of any samples taken.

2. ANNUAL RENTAL. To pay, or cause to be paid to the Superintendent for the use and benefit of the lessor, an advance annual rental of $1.00 per acre beginning on the approval date of this lease and continuing for so long as this lease is in force and effect. The annual rental payment should be received on, or PRIOR to, each anniversary date of this lease. The rent is not to be credited on the royalties accruing to the lessor under this lease. if the lease is surrendered or cancelled, no rent accruing to the lessor will be refunded.

3. DILIGENCE, PREVENTION OF WASTE. To exercise diligence in the conduct of prospecting and mining

operations, to carry on development and operations in a workmanlike manner and to the fullest possible extent; to neither commit nor suffer waste to be committed upon the land leased; to comply with the applicable laws of the state in which the land is located; to take appropriate steps to preserve the property and provide for the health and safety of workmen; to surrender and return promptly the premises upon the termination of this lease to whoever is lawfully entitled thereto, in as good condition as received, except for the ordinary wear and tear and unavoidable accidents in the proper use of the premises. If the payments agreed upon in this lease have been made and the other lease terms and applicable regulations have been complied with, the office fixtures and records, personal property, tools, pumping and drilling equipment, boilers, engines, and mining machinery and all other personal property and improvements on the leased premises (except the lessor's property) may be removed by the lessee as soon as practicable after the lease expires by forfeiture or otherwise.

4. INITIAL MINIMUM PRODUCTION REQUIREMENTS.

a. *Lessee's Obligation to Produce Coal at an Annual Rate of 10,000,000 Tons Per Year or Pay Minimum Royalties.* The lessee shall mine and ship coal from the leased premises at the rate of 10,000,000 tons per year on or before June of 1982 as provided in this paragraph. If, prior to July 1982, lessee has not mined and shipped 5,000,000 tons of coal (hereinafter referred to as the "initial required amount") from the leased premises during any half-year (which shall mean any six month period, as extended by periods of force majeure, beginning on July 1

or January 1) then for each calendar month during the period beginning on July 1, 1982, and continuing until the end of any half-year during which the lessee does mine and ship the required amount of coal from the leased premises, the lessee shall pay to the Superintendent for the use and benefit of the lessor on or before the 25th day of the succeeding calendar month (in addition to production royalties required to be paid hereunder) a minimum royalty equal to one-half of the difference between the production royalty actually paid by lessee during such month and the production royalty which would have been payable by the lessee during such month had the lessee mined and shipped 833,333.33 tons of coal (hereinafter referred to as the "initial required rate") from the leased premises during such calendar month at the prevailing royalty rate. The lessee's obligation to pay minimum royalty as provided above shall cease after it has mined and shipped the initial required amount of coal from the leased premises during any half-year. If, however, lessee does not mine and ship the initial required amount of coal from the leased premises during any half-year after July 1, 1982, then, as of the end of such half-year, lessee's obligation to pay minimum royalties for any calendar month during which it does not mine and ship coal at the required rate shall be revived and shall continue until the lessee has again mined and shipped the required amount of coal from the leased premises during any half-year. Lessee's obligation to pay minimum royalties thereafter may revive and cease again from time to time, as provided in this paragraph. As used in this lease the term "prevailing royalty rate" shall mean the weighted average per ton royalty actually paid by the

lessee on account of all coal mined and shipped from the leased premises during the preceding twelve month period.

b. *Lessee's Right to Avoid Payment of Minimum Royalties by Terminating a Portion of this Lease.* The lessee may avoid paying the minimum royalties required by paragraph 4 a. above by selecting a portion or portions of the leased premises reasonably estimated by it to contain a maximum of 500,000,000 tons of economically mineable coal in place less all coal previously mined and shipped from the leased premises, and then terminating this lease as provided in paragraph 16 as to any portion of the leased premises not so selected. In making its selection, the lessee shall exercise reasonable efforts to assure that the portion or portions of the leased premises selected are situated so as to allow economic mining of the coal, if any, within the portion of the leased premises with regard to which this lease is terminated. The lessee may make its selection at any time prior to the end of the development period as defined in paragraph 5 of this lease, and the lessee's obligation to pay minimum royalties under subparagraph 4 a. above shall cease as of the first day of the month next following 60 days after the lessee has made its selection and notified lessor thereof. If the lessee makes a selection and terminates its lease as to a portion of the leased premises, as provided in this paragraph, then the lessee's obligations in paragraph 5 shall terminate and that paragraph shall be of no further force or effect.

c. *Lessee's Right to Recover Minimum Royalties Paid.* All minimum royalties paid by the lessee pursuant to this paragraph may be recovered by the lessee by

applying the same as a credit against one-half of the first production royalties payable by the lessee after the lessee has mined and shipped the required amount of coal from the leased premises during any half-year without regard, however, to the time at which such minimum royalties were paid or the time at which such production royalties are payable.

d. *Cessation of Lessee's Obligations Under this Paragraph.* Lessee's obligations under this paragraph shall cease at the end of the development period as defined in paragraph 5 of this lease.

e. *Arbitration.* All disputes between the parties concerning the subject matter of this paragraph shall be submitted to arbitration as provided in paragraph 29 of this lease and the decision of the arbitrators shall be final and binding on the parties.

5. FINAL MINIMUM PRODUCTION REQUIREMENTS.

a. *Lessee's Obligation to Produce Coal at an Annual Rate of 15,000,000 Tons Per Year or Pay Minimum Royalties.* The lessee shall mine and ship coal from the leased premises at the rate of 15,000,000 tons per year on or before the end of the development period as provided in this paragraph. If, prior to the end of the development period, as defined below, lessee has not mined the shipped 7.5 million tons of coal (hereinafter referred to as the "final required amount ") from the leased premises in any half-year (which shall mean any six month period, as extended by periods of force majeure, beginning on July 1 or January 1), then for each calendar month during the period beginning at the end of the development period

and continuing until the end of any half-year during which the lessee does mine and ship the required amount of coal from the leased premises, the lessee shall pay to the Superintendent for the use and benefit of the lessor on or before the 25th day of the succeeding calendar month (in addition to production royalties required to be paid hereunder) a minimum royalty equal to one-half of the difference between the production royalty actually paid by the lessee during such month and the production royalty which would have been paid by the lessee during such month had the lessee mined and shipped 1,250,000 tons of coal (hereinafter referred to as the "final required rate") from the leased premises during such calendar month at the prevailing royalty rate. As used in this lease the term "development period" shall mean a period of eight years beginning on the earlier of December 1, 1981, or the date that Colorado Interstate Gas Company (CIG) exercises, terminates or allows to expire an option granted to it pursuant to an option agreement between CIG and the lessee dated December 1, 1971. The development period will be increased by six months for each year prior to 1982 in which CIG exercises, terminates or allows its option to expire. In no event, however, will the development period extend beyond the date upon which it is determined that lessee has failed, during such development period, to undertake in good faith all steps as are reasonably necessary in its judgment to permit it to mine and ship coal from the leased premises at the final required rate on or before the end of the development period. The lessee's obligation to pay minimum royalties, as provided above, shall cease after it has mined and shipped the final required amount of coal from the leased

premises during any half-year period. If, however, the lessee does not mine and ship the final required amount of coal from the leased premises during any half-year after the development period then lessee's obligation to pay minimum royalties for any month during which it does not mine and ship coal at the required rate shall be revived and shall continue until the lessee has again mined and shipped the required amount of coal from the leased premises during any half-year period. Lessee's obligation to pay minimum royalties thereafter may revive and cease again from time to time as provided in this paragraph but in no event shall it revive because of lessee's failure to mine and ship the required amount of coal from the leased premises during any half-year ending ten years after the end of the development period.

b. *Lessee's Right to Avoid Payment of Minimum Royalties by Terminating a Portion of this Lease.* Lessee may avoid paying the minimum royalties required by subparagraph 5 a. above by selecting the larger of the portions of the leased premises described below and then terminating this lease as to the balance of the leased premises as provided in paragraph 16. Such portions shall be (i) that portion or portions of the leased premises necessary to support operations at the annual productive capacity of the mining equipment and/or facility which is then permanently dedicated to the leased premises times thirty years (which thirty year period may be extended by an extension of the useful life of such mining equipment and/or facility caused by repair or replacement of, or addition to the same) less that portion of the leased premises from which coal has been previously mined provided, however, that this subparagraph 5 b. (i) shall

not be effective if the annual productive capacity of the mining facility and/or plan permanently dedicated to the leased premises at the date of the lessee's selection is not at least 13.5 million tons; or (ii) that portion or portions of the leased premises necessary to satisfy all existing agreements for the delivery of coal (which call for delivery of coal to commence within thirty months after the date of selection) and related mining plans; or (iii) that portion or portions of the leased premises reasonably estimated by the lessee to contain a maximum of 500,000,000 tons of economically mineable coal in place less all coal previously mined and shipped from the leased premises. In making its selection the lessee shall exercise reasonable efforts to assure that the portion or portions of the leased premises selected are situated so as to allow economic mining of the coal, if any, within the portion of the leased premises with regard to which this lease is terminated. The lessee may make its selection at any time during the term of this lease, and the lessee's obligation to pay minimum royalties under paragraph 5 a. above shall cease as of the 1st day of the next month following sixty days after the lessee has made its selection and notified the lessor thereof.

c. *Lessee's Right to Recover Minimum Royalties Paid.* All minimum royalties paid by the lessee pursuant to this paragraph may be recovered by the lessee by applying the same as a credit against one-half of the first production royalties payable by the lessee after the lessee has mined and shipped the final required amount of coal from the leased premises during any half-year without regard, however, to the time at which such minimum

royalties were paid or the time at which such production royalties are payable.

d. *Arbitration*. Any dispute between the parties concerning the subject matter of this paragraph shall be submitted to arbitration as provided in paragraph 29 of this lease and the decision of the arbitrators shall be final and binding on the parties.

6. PROTECTION OF ENVIRONMENT AND RESTORATION OF SURFACE. The lessee agrees to preserve and protect the natural environmental conditions on the land encompassed by its lease, or land affected by its exploration or mining operations, and to take such corrective actions as may be necessary within the scope of normal soil conservation and antistream and antiair pollution practices, as follows:

a. Conduct operations so as not to pollute any surface or subsurface fresh water supply.

b. Control water supplies in conformity with existing laws and tribal ordinances and in all cases hold erosion and flood damage to a minimum.

c. Terrace and landscape waste disposal areas in a reasonable manner at its own cost and expense. The landscaping shall include, but is not limited to, the planting of grasses, shrubs, and other vegetation which will partially screen the area from view and control water and wind erosion. The surface of any waste dumps shall be left reasonably flat, and tailings will be covered with soil to a depth that will permit the early establishment and propagation of vegetation upon the completion of use of

the leased premises or said waste or tailings dumps or deposits.

d. Conduct operations that will minimize air pollution which may result from stripping, mining, milling, hauling, leaching, or waste disposal, in conformity with existing or future laws or tribal laws or tribal ordinances enacted applicable to air pollution control.

e. As soon as practicable after the issuance of the lease, and before the commencement of any surface-disturbing activities, the lessee shall submit a plan of implementation which shall indicate how the previously-agreed-to stipulations of environmental preservation and surface reclamation will be carried out. The plan of implementation shall be in conformance with 25 CFR 177.7 and shall be submitted to the Regional Mining Supervisor, U.S. Geological Survey, and Superintendent for approval.

f. Lessee will not sell coal mined from the leased premises for use in a coal conversion or mine mouth generating facility to be located on the Crow Indian Reservation or within 50 miles of the exterior boundaries of the diminished Crow Indian Reservation without first receiving approval of such sale from the lessor. This limitation on the lessee's right to sell coal shall not apply to any coal sold to or mined by or for Colorado Interstate Gas Company (CIG) pursuant to an option agreement between CIG and the lessee dated December 1, 1971, but the lessor and lessee will use their best good faith efforts to obtain an agreement from CIG to the effect that CIG will seek the Crow Indian Tribe's approval of construction or operation by it of any coal

conversion or mine mouth generating facility located within 50 miles of the exterior boundaries of the diminished Crow Indian Reservation and which will use coal mined from the leased premises.

7. FOREST PROTECTION. The lessee agrees:

a. not to cut, destroy, or damage timber without prior authority of the Commissioner of Indian Affairs or his authorized representative, such authorization to be made only where required by the pursuance of necessary mining operations.

b. To pay for all such timber cut, destroyed, or damaged at rates prescribed by the Commissioner of Indian Affairs or his authorized representative, such rates to be determined on the basis of sales of similar timber in the vicinity.

c. Not to interfere with the sale or removal of timber from the land covered by this lease by contractors operating under an approved timber sales contract now in effect or which may be entered into during the period of this lease.

d. To do all in its power to prevent and suppress forest, brush, or grass fires on the leased land and in its vicinity, and to require its employees, contractors, subcontractors, and employees of contractors or subcontractors to do likewise. To place its employees, contractors, subcontractors, and the employees of such contractors or subcontractors employed on the leased land at the disposal of any authorized officer of the Indian Service for the purpose of suppressing forest, brush, or grass fires with the understanding that the

payment for such services shall be made at rates to be determined by the Commissioner of Indian Affairs or his authorized representative, which rates shall not be less than the rates of pay prevailing in the vicinity for services of similar character; PROVIDED, That no payment shall be made for services rendered in the suppression of fires for which the lessee, its employees, contractors, or subcontractors, or the employees of such contractors or subcontractors are responsible.

e. To pay for the loss of all timber 10 inches or more in diameter occasioned by fires for which it, or any of its employees, contractors, subcontractors, or the employees of such contractors or subcontractors are responsible for the start or spread, the assessment of the value of such damages to be determined by the Commissioner of Indian Affairs or his authorized representative on the basis of the value of such timber on sales of similar timber in the vicinity. Also, to pay liquidated damages of $25 per acre for all young timber less than 10 inches in diameter destroyed by such fires and to pay all costs for the suppression of fires for which it, or any of its employees, contractors, or subcontractors, or the employees of such contractors, [sic] or subcontractors are responsible.

f. Not to burn rubbish, trash, or other inflammable materials except with the consent of the authorized representative of the Commissioner of Indian Affairs, and not to use explosives in such manner as to scatter inflammable materials on the surface of the land during the fire season, except as authorized to do so by such representative.

8. DEVELOPMENT. The land described herein shall not be held by the lessee for speculative purposes, but for mining coal. Within 20 days after the anniversary date of the lease, the lessee shall file with the Superintendent an itemized statement, in duplicate, of the amount and character of the previous year's expenditures incurred in actual mining operations and development and in the construction of improvements on or for the benefit of the leased land. The statement must be certified under oath by the lessee or its agent. With respect to reports to be rendered direct to the Regional Mining Supervisor, U.S. Geological Survey, and matters concerning operating and safety regulations, the lessee shall observe the requirements of Title 30 of the Code of Federal Regulations, Part 211 (cited in paragraph 10 of this lease). If the lessee fails in the diligent development and continued prospecting and exploration work or operation of the mine, except as provided in section 28 of this lease, this lease will be subject to cancellation. Whenever the Secretary of the Interior, or his authorized representative, considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may authorize the suspension of operations for such time as he considers advisable, but this does not release the lessee from paying the advance annual rental. Payment of minimum royalty will not excuse complying with the provisions of this section, except as expressly provided in paragraphs 4 and 5 of this lease.

9. MONTHLY STATEMENTS. To keep an accurate record of the mining operations, showing the sales, prices, dates, purchasers, and the amount of coal mined, the amount of coal removed, and the gross receipts, and

to furnish the Superintendent sworn monthly reports before the 25th of the succeeding month. All royalty and advance rental due shall be a lien on all implements, tools, movable machinery, and all other chattels used in the operation and upon all of the unsold coal obtained under the lease. An audit of the accounts and books of the lessee shall be made annually or at any other time directed by the Superintendent by a certified public accountant approved by the Secretary of the Interior and at the expense of the lessee. The lessee shall furnish, through the Superintendent, a free copy of the audit to the Secretary of the Interior within 30 days after the completion of each audit.

10. REGULATIONS. To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases including, but not limited to, 25 CFR 171, 177, and 30 CFR 211. Rate of royalty, the annual rental, or the terms of the lease may not be changed by a future regulation without the written consent of the parties to this lease.

11. ASSIGNMENT OF LEASE. Not to assign this lease or any interest therein by an operating agreement including agreements providing for payment of overriding royalty or otherwise, nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.

12. BOND. To furnish to the Superintendent an acceptable surety bond as provided in 25 CFR 171.6 or 177.8. The right is reserved to the Secretary of the Interior or his authorized representative to increase the amount of bond.

13. UNLAWFUL CONDUCT. The lessee further agrees that it will not willfully use or permit to be used any part of said premises for any unlawful conduct or purpose whatsoever; and that any violation of this clause by the lessee or with its knowledge, shall render this lease voidable at the option of the Superintendent.

14. INSPECTION. The leased premises, producing operations, appurtenances, and all books and accounts of the lessee may be inspected by the lessor and its agents or any authorized representative of the Secretary of the Interior.

15. DISPOSITION OF MINERALS AND SURFACE. The lessor expressly reserves the right to lease, sell, or otherwise dispose of the oil, gas, sand, gravel, building stone, and the surface of the lands in this lease under existing law or laws hereafter enacted, such disposition to be subject to the right of the lessee to use as much of the surface as is necessary in the extraction and removal of the minerals from the leased land.

16. SURRENDER AND TERMINATION. The lessee may at any time terminate this lease or any part thereof upon the payment of all rentals, royalties, and other obligations due to the lessor and a surrender fee of $5 and upon written notice being given 60 days in advance to the lessor through the Crow Tribal Council and the Secretary of the Interior. In the event restrictions have not

been removed, the lessee shall submit a showing satisfactory to the lessor through the Crow Tribal Council and to the Secretary of the Interior or his authorized representative that full provision has been made for the conservation and protection of the property. The lease shall continue in full force and effect as to the lands not so surrendered. If this lease or any assignment thereof has been recorded, the lessee or assignee shall file a recorded release with its application to the Superintendent for termination of this lease.

17. RELINQUISHMENT OF SUPERVISION BY THE SECRETARY OF THE INTERIOR. Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the acreage covered hereby, the relinquishment will not bind the lessee until the Secretary has given 30 days' written notice. Until all the requirements for relinquishment are fulfilled, lessee shall continue to make all payments due under subsections 1, 2, 4 and 5. After notice of relinquishment has been received by lessee, this lease is subject to the following further conditions:

a. All rentals and royalties accruing shall be paid directly to lessor or its successors in title.

b. If at the time supervision is relinquished by the Secretary of the Interior as to all lands under this lease, and lessee has made all payments due under the lease and has fully performed all obligations on its part to be performed up to the time of such relinquishment, the bond given to secure the performance of the lease and on file in the Indian Office shall be of no further force or effect.

18. WATER WELLS. The lessee may, at its own expense, drill and equip water wells on the leased premises and agrees that all wells will be left intact and properly cased at the termination of the lease by expiration of its own term or otherwise. Lessee shall have the right to remove all mechanical pumping equipment installed by it at any well.

19. DAMAGES. The lessee shall conduct all operations authorized in this lease with due regard to preventing unnecessary damages to vegetation, timber, soil, roads, bridges, cattle guards, fences, and other improvements, including construction, operation, or maintenance of any of the facilities on or connected with this lease which causes damage to the watershed or pollution of the water resources. On termination of operations under this lease, the lessee shall make provisions for the conservation, repair, and protection of the property and leave all the areas on which the lessee has worked in a condition that will not be hazardous to life or limb, and will be to the satisfaction of the Superintendent.

20. LIABILITY FOR DAMAGE. The lessee is liable for any and all damages resulting from its operations under this lease, including injury to the lessor, and for any and all damage to, or destruction of, all property, caused by the lessee's operations hereunder. The lessee agrees to save and hold the lessor and the United States, its employees and licensees, harmless from all suits for injury or claims for damages to persons and property resulting from the lessee's operations under this lease.

21. ROADS. The lessee may use existing roads, if any, on the land and may construct, and maintain, at its

own expense, any additional roads across lessor's lands that are necessary in carrying on the actual mining, prospecting, and exploration work after the location of these roads has been approved in writing by the Superintendent of the Crow Indian Agency. The public obtains no rights to these roads, and upon termination of this lease or if at any time it becomes unnecessary for lessee to use the road for conducting the operations authorized under this lease, the right to use the road shall thereupon cease and all the rights shall revest in lessor in accordance with law. The lessee shall hold the lessor and the United States harmless and indemnify them against any loss or damage that might result from the negligent construction or maintenance by lessee of the road.

22. INDIAN LABOR. The lessee shall give a priority right of employment to members of the Crow Tribe for all positions for which they are qualified and available and shall pay the prevailing wage rates for similar services in the area. Upon initial hiring and whenever thereafter a job opening occurs, the lessee, its contractors or subcontractors, shall give notice of such opening to the Crow Tribe stating the time and place where job applications will be accepted. Except in cases of emergency, no nonmember of the Tribe shall be hired for any job until at least 48 hours (not including Saturdays and Sundays) following the delivery of such notice to the Crow Tribe. The terms of this paragraph may be amended by subsequent agreement of the parties to this lease.

23. INSURANCE, SOCIAL SECURITY, TAXES, ETC. The lessee agrees to carry such insurance covering all persons working in, on, or in connection with the leased premises for the lessee as will fully comply with the

provisions of the statutes of the State of Montana covering workmen's compensation and occupational disease, as are now in force or as may be amended. Further, the lessee agrees to comply with all the terms and provisions of all applicable laws of the state of Montana and of the United States of America as now exist or as may be amended, pertaining to Social Security, unemployment compensation, wages, hours, and conditions of labor; and to indemnify and hold the lessor and the United States harmless from payment of any damages occasioned by the lessee's failure to comply with these laws. The lessee shall pay all taxes lawfully levied or assessed on the sale, severance, production, extraction, or removal of the coal covered by this lease.

24. HEIRS AND SUCCESSORS IN INTEREST. It is further covenanted and agreed that each obligation under this lease shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the parties to this lease.

25. GOVERNMENT EMPLOYEES CANNOT ACQUIRE LEASE. No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise, and no employee of the Department of the Interior shall be permitted to acquire any interest in such leases by ownership of stock in corporations having leases or in any other manner.

26. CANCELLATION AND FORFEITURE. When, in the opinion of the Secretary, the lessee has violated any of

the terms and conditions of the lease or of the applicable regulations, the lessee shall be served with a written notice setting forth the alleged violations and allowing him 30 days from the date of said notice to show cause why the lease should not be cancelled. If it is determined that the violation may be corrected and the lessee agrees to take the necessary corrective actions, he may be given a reasonable period of time (which, with regard to any payment of money due under this lease shall not be more than 60 days) to carry out such measures, or he may request a hearing within the 30 days after the date of the notice. If it is determined, following the hearing, that the violation may be corrected, and the lessee agrees to take the necessary corrective action, the Secretary may permit the lessee to take such corrective action, in which case he will establish a reasonable period of time (which, with regard to any payment of money due under this lease shall not be more than 60 days) to carry out such measures. The time granted for correcting violations shall not serve to extend or continue tribal leases beyond the primary term. If the lessee fails to show cause why the lease should not be cancelled or fails to take corrective measures to cure the default within the specified period of time granted, the Secretary shall serve written notice to the lessee that the lease is null and void, and the lessor shall then be entitled and authorized to take immediate possession of the premises.

27. PRESERVATION OF ANTIQUITIES. It will be the responsibility of the lessee to obtain necessary archaeological clearances in accordance with the Antiquities Act of 1906, prior to the start of any mining operations whatsoever.

28. FORCE MAJEURE. If, because of force majeure, the lessee is reasonably prevented from performing any of its obligations under this lease or satisfying any of the conditions of this lease, including those obligations and conditions which if unfulfilled may limit the term of the lease or entitle the lessor to receive minimum royalties, then such obligations and conditions shall be reduced, and any time, date or production requirements or limitations (including those on the term of this lease if production of coal in paying quantities is interrupted by such force majeure), shall be extended or reduced to the extent the lessee is so prevented. As used herein, "force majeure" means any act or occurrence which is beyond the control of the lessee, including but not limited to acts of God, inability to obtain permission to use surface overlying the leased premises, legislation or lawful regulations thereunder, court orders, inability to receive, retain or renew in a timely fashion any permit, license or other approval necessary to continue or expand the lessee's prospecting or mining operations or its activities necessary or incident thereto, fire, flood, explosion, strikes, labor disputes, sabotage, acts of the public enemy, riots, civil commotion, acts of any civil or military authority, wars, major failure of mine, plant, facility or equipment, materials shortages, embargoes, and unavailability of transportation facilities (including inability to obtain railroad cars). The lessee shall make all reasonable and diligent efforts to remove any force majeure and resume its performance hereunder with all reasonable dispatch.

29. ARBITRATION. If either party calls for arbitration with regard to an arbitrable matter as provided herein, a board of arbitration shall be established. Each

party shall appoint an arbitrator and the two arbitrators so chosen shall appoint a third disinterested person to act as chairman of the board of arbitration. If the first two arbitrators cannot agree on the third, he shall be appointed by the American Arbitration Association. The decision of any two arbitrators so appointed shall be the decision of the board of arbitration, and such decision shall be binding on the parties. The arbitrators so appointed shall meet within sixty (60) days of the call of arbitration and they shall render their decision within sixty (60) days thereafter. In all other respects, such arbitration and the decision of the board of arbitration thereunder shall proceed under and be interpreted and construed according to the Federal Arbitration Act or succeeding legislation.

30. HEADINGS. Headings as to the contents of particular paragraphs of this lease are inserted only for convenience and are in no way to be construed as a part of this lease or as a limitation or expansion of the scope of the particular paragraphs to which they refer.

31. OBLIGATIONS. While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease and the obligations of its sureties are to the United States as well as to the owners of the leased premises.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above written.

Two witnesses to execution by Lessor:

/s/ John Hill
P.O. 361
Crow/Agency Mont.
P. O. /s/ Illegible

/s/ Illegible

Two witnesses to execution by Lessee:

/s/ Illegible
P. O. /s/ Billings, MT
/s/ Illegible
P. O. /s/ 1016 Billings, MT.

CROW TRIBE OF THE CROW INDIAN RESERVATION

BY: /s/ Patrick Stands Over Bull
CHAIRMAN, CROW TRIBAL COUNCIL

ATTEST: /s/ Illegible
SECRETARY, CROW TRIBAL COUNCIL

LESSOR

WESTMORELAND RESOURCES, a general partnership

BY: /s/ Pemberton Hutchinson
PEMBERTON HUTCHINSON, PRESIDENT

LESSEE

ACKNOWLEDGEMENT OF LESSOR

STATE OF MONTANA)
) ss.
County of Yellowstone)

Before me, a notary public, on this 26th day of November, 1974, personally appeared Patrick Stands Over Bull, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

/s/ Dorothy Marchington
Notary Public for the
State of Montana
Residing at Billings Montana
My Commission expires
3-26-76 .

* * *

ACKNOWLEDGEMENT OF LESSEE

STATE OF MONTANA)
) ss.
County of Yellowstone)

Before me, a notary public, on this 26th day of November, 1974, personally appeared PEMBERTON HUTCHINSON, and acknowledged to me that he is the President of WESTMORELAND RESOURCES, a partnership, whose name is subscribed to the within instrument and acknowledged to me that he executed the same on behalf of said partnership.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

/s/ Dorothy Marchington
Notary Public for the
State of Montana
Residing at Billings, Montana
My Commission expires
3-26-76 .

APPROVAL BY THE SECRETARY OF THE INTERIOR

/s/ Rogers CB Morton

EXHIBIT "A"

Township 1 South, Range 37 East, M.P.M., Big Horn County, Montana

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Section 1: Lots 1, 2, 3, 4, 5, 6, 7, 8, $S^1/_2W^1/_2$, $N^1/_2S^1/_2$
Section 2: Lots 1, $E^1/_2$ of 2, 7, 8, $E^1/_2SW^1/_4NE^1/_4$, $SE^1/_4NE^1/_4$, $NE^1/_4SW^1/_4$, $N^1/_2SE^1/_4$

Township 1 North, Range 37 East, M.P.M., Big Horn County, Montana

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Section 1: $SW^1/_4SW^1/_4$
Section 2: $SW^1/_4NW^1/_4$, $SW^1/_4$, $W^1/_2SE^1/_4$, $SE^1/_4SE^1/_4$
Section 3: $S^1/_2NE^1/_4$, $SE^1/_4$
Section 11: All
Section 12: $SW^1/_4SW^1/_4NE^1/_4$, $W^1/_2$, $W^1/_2SE^1/_4$, $SE^1/_4SE^1/_4$
Section 13: All
Section 14: All
Section 15: $SE^1/_4SE^1/_4$
Section 22: $N^1/_2$, $SE^1/_4SW^1/_4$
Section 23: All
Section 24: All
Section 25: All
Section 26: All
Section 27: $NE^1/_4$, $E^1/_2NE^1/_4NW^1/_4$, $NE^1/_4SE^1/_4NW^1/_4$, $E^1/_2NW^1/_4SW^1/_4$, $NE^1/_4SW^1/_4SW^1/_4$, $E^1/_2SW^1/_4$, $SE^1/_4$
Section 34: $N^1/_2NE^1/_4$, $SE^1/_4NE^1/_4$, $NE^1/_4NE^1/_4NW^1/_4$, $SE^1/_4NW^1/_4$, $E^1/_2SW^1/_4$, $W^1/_2SE^1/_4$, $SE^1/_4SE^1/_4$
Section 35: $N^1/_2$, $N^1/_2N^1/_2SW^1/_4$, $S^1/_2SW^1/_4$, $N^1/_2SE^1/_4$, $S^1/_2SW^1/_4SE^1/_4$, $SE^1/_4SE^1/_4$

Township 1 South, Range 38 East, M.P.M., Big Horn County, Montana

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Section 2: Lots 1, 2, 3
Section 3: Lots 1, 2, 3, 4, S1/2
Section 4: Lots 1, 2, 3, 4, S1/2
Section 5: Lots 1, 2, 3, 4, S1/2
Section 8: Lots 1, 2, 3, 4, N1/2W1/2
Section 9: Lots 1, 2, 3, 4, N1/2N1/2
Section 10: Lots 1, 2, 3, 4, N1/2N1/2
Section 11: Lots 1, 13

Township 1 North, Range 38 East, M.P.M., Big Horn County, Montana

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Section 17: Lot 4, SW1/4, SW1/4SE1/4
Section 18: S1/2NE1/4, NW1/4, S1/2
Section 19: All
Section 20: Lots 1, 2, 3, 4, W1/2E1/2, W1/2
Section 29: Lots 1, 2, 3, 4, W1/2E1/2, W1/2
Section 30: All
Section 31: All
Section 32: Lots 1, 2, 3, 4, W1/2E1/2, W1/2

Containing 14,745.92 acres, more or less.

SETTLEMENT AGREEMENT

THIS AGREEMENT is executed as of November 26, 1974 between THE CROW TRIBE OF INDIANS OF THE CROW RESERVATION ("Crow Tribe") and WESTMORELAND RESOURCES, a general partnership ("Westmoreland").

THE BACKGROUND of this Agreement is as follows:

A. On October 20, 1970, Westmoreland received two Mineral Prospecting Permits from the Crow Tribe ("the Permits") to prospect for coal on two tracts of land in Big Horn County, Montana ("Tract No. 2 and Tract No. 3") pursuant to an auction sale on September 16, 1970.

B. The Permits gave Westmoreland the right to obtain leases from the Crow Tribe of the coal in Tract No. 2 and Tract No. 3, and two Coal Mining Leases, one for each tract, between the Crow Tribe as lessor and Westmoreland as lessee were executed on June 6, 1972 and approved by the United States Bureau of Indian Affairs ("BIA") on June 14, 1972.

C. Since that time various disputes have arisen between the Crow Tribe and Westmoreland regarding the Coal Mining Leases. On July 13, 1974 the Crow Tribe, acting through the Crow Tribal Council, adopted a resolution (Resolution 75-06A) declaring the Coal Mining Leases invalid and directing that action be taken with the Secretary of the Interior or otherwise to establish such invalidity. On or about July 31, 1974 the Crow Tribe filed a Petition with the Secretary of the Interior asking that the Coal Mining Leases be declared invalid, and in the

alternative that they be modified in various ways. Westmoreland filed an Answer to that Petition and several motions, the Crow Tribe filed a Reply, and the matter is now at issue.

D. Following extensive negotiations on October 30-31, 1974, representatives of the Crow Tribe and Westmoreland reached an agreement settling and compromising all their disputes and differences ("the Settlement"). The Settlement is represented by four documents: Amended Coal Mining Lease of Tract No. 2, Amended Coal Mining Lease of Tract No. 3, Land Purchase Agreement, and this Agreement. The four agreements, each of which depends for its effectiveness upon the others, will be submitted to the Crow Tribal Council for approval, and if approved will become effective upon (1) execution and delivery of the agreements by the duly authorized officers of the Crow Tribe and by the duly authorized officers of Westmoreland, (2) written approval of the Secretary of the Interior, and (3) receipt by Westmoreland of an opinion of counsel to the Crow Tribe, that the four documents comprising the Settlement were duly authorized and validly executed by the Crow Tribe and are enforceable in accordance with their terms.

E. The two Amended Coal Mining Leases and the Land Purchase Agreement set forth the terms upon which the Crow Tribe is leasing Tracts No. 2 and 3 to Westmoreland. This Settlement Agreement is intended to signify the agreement of the parties that the Settlement shall forever settle and end their disputes over the Permits and Coal Mining Leases.

THE TERMS of this Agreement are as follows:

1. Upon this Agreement becoming effective pursuant to paragraph D above, and in consideration for the promises and undertakings made by Westmoreland in the Amended Coal Mining Leases and in the Land Purchase Agreement, and for other good and valuable consideration and intending to be legally bound, the Crow Tribe releases and discharges Westmoreland from every claim the Crow Tribe may have, now or arising in the future, known or unknown, that either of the Permits or the Amended Coal Mining Leases was or is invalid or ineffective or unenforceable in any way, or that any term or provision of either Permit or Amended Coal Mining Lease was or is invalid or ineffective or unenforceable. The Crow Tribe, covenants and agrees that it will not, at any time hereafter, in any legal proceeding in any court or in any branch, bureau or office of the government of the United States, or of any state or political subdivision, or of the Crow Tribe, challenge the validity or propriety of either of the Permits or of either of the Amended Coal Mining Leases, or of any provision or term thereof, whether by suit, claim, defense or otherwise, (provided that the Crow Tribe shall have the remedies granted in the Leases or by law for breach of any provision of the Amended Coal Mining Leases or the Land Purchase Agreement, as set forth in paragraph 5 below).

2. Without intending in any way to limit the generality of the foregoing, the Crow Tribe covenants and agrees that it will never claim, and hereby releases all claims, that the Permits or the Amended Coal Mining Leases were or are invalid or improper because:

a. Not preceded or accompanied by an evaluation of the Crow Tribe's coal reserves, either by the Crow Tribe or the BIA; or

b. Permits granted exclusive options in the permittee to obtain leases; or

c. Either of the Permits or either of the Amended Coal Mining Leases included or includes too much acreage, or too much coal (whether in gross or of any particular seam, outcrop or other formation or configuration); or

d. The Coal Leases were not accompanied by valid and binding waivers of any applicable acreage limitation; or

e. Either of the Permits or the Amended Coal Mining Leases was offered for sale or issued under a federal statute, order or regulation that did not apply to or authorize such Permit or Lease; or

f. The term or duration of the Amended Coal Mining Leases, as stated therein, is improper, invalid or unauthorized; or

g. Not preceded or accompanied by a technical examination or technical assessment as that term is used in 25 Code of Federal Regulations 177; or

h. Not preceded or accompanied by an environmental impact statement, or otherwise not issued in compliance with any environmental law, order or regulation of the United States, or of any state or political subdivision or of the Crow Tribe; or

i. Not authorized by the Crow Tribal Constitution or By-laws or by any resolution or other action of the Crow Tribe or any of its committees or other representatives, or in any other manner not properly authorized, approved and executed in compliance with the Crow Tribal Constitution, By-laws, resolutions and other applicable tribal law; or

j. Of any claim of breach by the BIA, the Department of the Interior, or by any other officer, bureau or agency of the United States, of any trust responsibility to the Crow Tribe, or of any law, order or policy for the protection of the Crow Tribe; or

k. Any provision of either Permit or Amended Coal Mining Lease is invalid or improper or not authorized by law, or the permit or lease omits any provision which should have been included under any applicable law, regulation or policy.

3. The Crow Tribe and Westmoreland agree that each will give the other the fullest good faith co-operation, and assist the other in all possible ways, and join with the other in any undertaking that may be advisable, to correct any defect in the Amended Coal Mining Leases or in their authorization, issue and execution, including any proceeding in or request for action by the judicial, executive or legislative branch of the federal government.

4. The Crow Tribe will promptly withdraw its Petition before the Secretary of the Interior by letter stating that the withdrawal is with prejudice to any further proceeding challenging the validity of the Permits or Amended Coal Mining Leases. Without recognizing the

validity or invalidity of the arguments raised in the petition the parties hereto agree that the terms of the Amended Coal Mining Leases and Land Purchase Agreement are unique and represent a settlement that the Crow Tribe finds satisfactory and recognizes the rights of the Crow Tribe, and the parties agree as follows:

a. To ask the Secretary of the Interior for a special waiver under 25 CFR 1.2 of any regulation contained in 25 CFR (including but not limited to parts 171, 173 and 177) that is not consistent with the above-mentioned Amended Coal Mining Leases, Land Purchase Agreement or this Settlement Agreement;

b. To ask the Secretary to find that such a general waiver under 25 CFR 1.2 is in the best interests of the Crow Tribe, as the Tribe has found the documents to be satisfactory in that they provide the financial, economic and social protections that the Tribe deems necessary; and

c. That the Crow Tribe may claim any and all violations of 25 CFR regulations against the BIA relating to any and all other coal permits and leases purportedly entered into by the Crow Tribe, with the exception of the above-mentioned documents between the Crow Tribe and Westmoreland, as further set forth in paragraph 9 below.

5. Should Westmoreland for any reason breach any agreement or undertaking by it contained in either of the Amended Coal Mining Leases or the Land Purchase Agreement, the Crow Tribe shall have all of the remedies granted to it in such documents or by law, but shall not assert, and hereby releases any right it might have to

assert, such breach by Westmoreland as a failure of consideration entitling the Crow Tribe to rescind or cancel this Agreement, or as giving the Crow Tribe any legal ground or right to declare this Agreement breached by Westmoreland, or in any way to treat this Agreement as no longer effective and the Crow Tribe released from its covenants and agreements hereunder.

6. The Crow Tribe will in the utmost good faith and at all times use its best efforts to secure compliance by the BIA, the Secretary of the Interior and all other agencies and representatives of the United States with the covenants and agreements contained herein and will not authorize or permit any officer or agency of the United States to take any of the actions or assert any of the claims which the Crow Tribe has agreed not to take or assert herein.

7. The Crow Tribe hereby approves, and will use its best efforts to secure the approval of the BIA, and of any other agency, bureau or officer of the United States that may be necessary to (i) a sublease by Westmoreland to Northern States Power Company of the Amended Coal Mining Lease of Tract No. 2, and (ii) such reasonable assignments of either or both of the Amended Coal Mining Leases as Westmoreland may from time to time desire to make to lenders or other extenders of credit as security for loans or other extensions of credit to Westmoreland (the Crow Tribe acknowledging the additional financial burdens of development of the coal resources undertaken by Westmoreland as a consequence of the provisions of the Amended Coal Mining Leases), and (iii) any assignment of the Amended Coal Mining Leases by Westmoreland to any partnership, corporation or other entity

resulting from a reorganization of Westmoreland. The Crow Tribe will not unreasonably withhold its approval, where required by applicable law, to any mining plan, reclamation plan or other proposal Westmoreland may make with respect to Tract No. 2 or Tract No. 3. In each of the above cases the Crow Tribe will give its approval without demanding other or further consideration therefor from Westmoreland or others.

8. Westmoreland agrees to pay the royalties provided in the Amended Coal Mining Leases, at the rates therein provided, retroactive to July 1, 1974.

9. The Covenants and agreements of the parties herein shall be binding on and shall inure to the benefit of them and their successors and assigns. However, this Agreement does not confer any benefits or rights on third parties, and this Agreement, which relates solely to the rights of Westmoreland and the Crow Tribe and the relationship between them, shall in no way limit the rights of the Crow Tribe to assert with respect to other permits or leases, involving other permittees and lessees, any claims similar to those it is herein releasing and renouncing with respect to its permits and leases with Westmoreland.

Executed as of the dated [sic] stated at the beginning.

Witnesses:

_____

_____

_____

_____

THE CROW TRIBE OF INDIANS
OF THE CROW RESERVATION

By: _____

WESTMORELAND RESOURCES

By: _____

LAND PURCHASE OPTION AGREEMENT

THIS IS AN AGREEMENT dated the 26th day of November, 1974, between the Crow Indian Tribe of the Crow Reservation, State of Montana (Crow Tribe) and Westmoreland Resources, a partnership of Hardin, Montana (Westmoreland).

WITNESSETH:

For and in consideration of Ten and No/100 Dollars ($10.00) paid by the Crow Tribe to Westmoreland, receipt of which is hereby acknowledged, Westmoreland agrees that if and when it determines, in its own sole discretion, that any tract or parcel of surface acquired by it in connection with any coal mining operations on the lands overlying the coal covered by either of the coal mining leases dated November 26, 1974 (Leases) between the parties hereto is no longer needed in connection with such coal mining operations (which shall include complete reclamation), then the Crow Tribe shall have an

option to purchase all, but not less than all, of such tract or parcel upon the terms and conditions hereinafter set forth. Westmoreland further agrees that it will not unreasonably withhold its determination that any tract or parcel of surface is no longer needed in connection with such coal mining operations.

1. Westmoreland shall give the Crow Tribe notice of its determination that any tract or parcel of land is no longer needed in connection with such coal mining operations.

2. The Crow Tribe shall have sixty (60) days after receipt of such notice given by Westmoreland within which to exercise its option by giving notice to Westmoreland of its exercise of the same.

3. The purchase price shall be the then fair market value of such surface as determined by mutual agreement of the parties.

4. If the parties are unable to agree upon such fair market value within thirty (30) days after the Crow Tribe notifies Westmoreland of its desire to purchase, either party may immediately call for arbitration. In this event, both parties shall select one arbitrator within ten (10) days after the call for arbitration. The two arbitrators so chosen shall appoint a third disinterested person to act as chairman of the board of arbitration. If the first two arbitrators, cannot agree on the third, he shall be appointed by the American Arbitration Association. The decision of any two arbitrators so appointed shall be the decision of the board of arbitration. The arbitrators so appointed shall meet within thirty (30) days of the call of arbitration and they shall render their decision within ten

(10) days thereafter. In all other respects, such arbitration and the decision of the board of arbitration thereunder shall proceed under and be interpreted and construed according to the Federal Arbitration Act.

5. Settlement with regard to any sale hereunder shall take place within sixty (60) days after the earlier of the date upon which the parties mutually agree upon the purchase price or the date upon which the board of arbitration presents its appraisal. At settlement, Westmoreland shall convey title to the Crow Tribe by quit claim deed or an agreement to deliver a quit claim deed and the Crow Tribe shall pay the purchase price in a manner agreed upon by the parties. Nothing herein shall prevent the United States from accepting such surface in trust for the Crow Tribe.

6. The Crow Tribe expressly acknowledges that Westmoreland has previously conveyed to or caused to be reserved to third persons various rights to purchase, options, licenses, easements, leaseholds and security interests affecting the lands described in this Agreement. The Crow Tribe further acknowledges that the option to purchase created by this Agreement shall be subject and subordinate to any of the foregoing described interests conveyed to or reserved by third persons either before or after the date of this Agreement, and that this Agreement shall not prevent Westmoreland from creating any such interest in any such third persons after the date of this Agreement.

7. If the Crow Tribe does not exercise its option as required by paragraph 2 or does not proceed to settlement as required by paragraph 5, its option shall terminate as to the particular parcel of [sic] tract of surface with regard to which Westmoreland gave notice as required by paragraph 1. If the Crow Tribe's option terminates as provided in this paragraph, the Crow Tribe shall furnish to Westmoreland evidence reasonably required by Westmoreland of the termination of such option.

8. All notices required to be given hereunder shall be in writing and shall be delivered by registered mail postage prepaid, and addressed as follows:

(a) If the Crow Tribe to:

Superintendent of the Crow Reservation
Crow Agency, Montana 59022

With copies to:

Chairman – Mineral Committee
Chairman – Crow Indian Tribe
Chairman – Land Purchase Committee

All of Crow Agency, Montana 59022

(b) If Westmoreland to:

2703 Montana Avenue
Billings, Montana 59103

Notice by mail shall be deemed complete when deposited in the United States Post Office as provided above. Any change of address shall be communicated in the same manner as notice provided above.

9. Both parties agree that the times for performance set forth herein are essential to this Agreement.

10. The benefit of this Agreement shall extend to and it shall be binding upon the parties hereto, their successors and assigns.

11. This Agreement, and all rights and obligations hereunder, shall terminate on the expiration of twenty-one (21) years from the date of the death of the last surviving of Patrick Stands Over Bull, Tyron L. Ten Bear, Robert Yellowtail, Jr., and Oliver Hugs.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first above written.

WESTMORELAND RESOURCES

By _____

CROW TRIBE OF INDIANS OF THE CROW INDIAN RESERVATION

By _____
Chairman, Crow Tribal Council

ATTEST:

_____
Secretary, Crow Tribal Council

_____

STATEMENT OF THE CROW TRIBE OF INDIANS
IN OPPOSITION TO SENATE BILL 13
PROVIDING FOR A SUBSTANTIAL INCREASE
IN MONTANA STATE COAL TAXES

TO: Members of the Montana Legislature

FROM: Pat Stands, Chairman, Crow Tribe of Indians
Robert Yellowtail, Jr., Vice-Chairman, Crow Tribe of Indians

Introduction

The Crow Tribe of Indians is currently establishing a plan for the development of its treaty reserved coal resources. A portion of the Crow Tribe's coal is presently being mined by Westmoreland Resources on an area north of the Crow Reservation called the "Crow Ceded Strip". Other mining operators hold permits and leases on the Ceded Strip and on the Crow Reservation. At this time the Crow Tribe is involved in a careful process of determining the extent to which its coal reserves should be mined. As a part of this decision making the Tribe is evaluating the social and environmental impacts of coal mining, side by side with the significant economic advantages which the Tribe will derive from mining. The Crow Tribe believes that significant social and environmental injury may occur if mining is undertaken without proper planning, and if a number of associated large-scale power generating facilities and conversion plants are constructed on or near the Crow Reservation. To that end the Crow Tribe has inserted in its leases with Westmoreland Resources and will insist as a condition to other mining

that no power generating or conversion facilities can be developed without the express consent of the Crow Tribe.

The Crow Tribe believes that the State of Montana has an important governmental responsibility in the development of these Indian resources, particularly where the development takes place on the Crow Ceded Strip where the surface is controlled by non-Indians. The role of the State of Montana is substantially reduced where development takes place on the Crow Reservation, for under long-standing principles of federal law the Crow Tribe retains important sovereign Indian powers, and exercises governmental and proprietary jurisdiction over the people and property within its reservation. Of course, on the Reservation, the Crow Tribe and the United States are responsible for providing nearly all governmental expenditures required by the Crow people.

Given the Crow Tribe's status as the owner of large coal reserves, and as the governmental body primarily responsible for controlling mining on or near the Crow Reservation, we are very disturbed about the levels of taxation proposed in Senate Bill 13. We basically have two objections to the taxes proposed in that senate bill: (1) that they are so out of line with taxes imposed by other neighboring states that Crow coal will no longer be competitive and therefore our coal development program will suffer, and (2) that the taxes bear no relation to the responsibilities and burdens which coal development has imposed on the State of Montana – indeed insofar as these taxes would relate to coal development on the Crow Reservation they may constitute not merely high taxation, but a "taking" of private treaty-reserved Indian coal.

A. Economic Aspects

Crow coal competes with coal which is mined at Colstrip, Montana and Decker, Montana, and in the Powder River Basin of Northern Wyoming. To date the primary customers of these mining operations have been middle western and southern utilities which have purchased the coal for delivery for burning in their power generating facilities. The transportation costs are very large and as a result the minor differences in transportation costs between the coal mined in Montana and coal mined in Wyoming play a significant role in determining the overall price of the coal and therefore the overall competitiveness of the coal. Also the quality of the coal as well as the reclamation fees and state taxes placed on the coal become significant in determining the economics of mining Montana coal. Generally speaking Crow coal is of comparable quality with most Wyoming coal although it is of lower quality than coal being mined in Decker, Montana. At the same time, the reclamation costs imposed by the State of Montana on Crow coal presently being mined on the Crow Ceded Area as well as the existing State of Montana taxes impose costs on the selling price of Crow coal which are substantially in excess of costs imposed by the neighboring states. We are concerned about the current status of these unequal costs. We believe that to substantially increase the taxation of Montana coal will be to seriously jeopardize the ability of the Crow Tribe and its mining operators to sell coal in the marketplace.

It is our understanding that the Montana Legislative Interim Committee on Coal Taxes published comparative state coal tax numbers for the year 1973 and found the

following figures: State of Montana, 12.4% of gross value of coal for all state coal taxes; State of Wyoming, 6.8% of gross value of coal for all state coal taxes; State of Kentucky, 5.5% of gross value of coal for all state coal taxes; North Dakota, negligible taxation.

It can be seen from these figures developed by a Montana legislative committee that through 1973 the State of Montana imposed taxes which were almost twice that imposed by its nearest competitor, the State of Wyoming. It is our understanding that Senate Bill 13 would operate to substantially increase this total package of state taxation. The calculations which we have made suggest that on new tonnages selling for approximately $5.00 a ton, the Montana license or severance tax would jump from the present figure of approximately 34¢ per ton on BTU coal of the quality being mined by the Crows to a figure of $1.25. Our figures would also suggest that the present net proceeds tax which is imposed by the counties of the State of Montana would substantially increase in future years from the present approximate figure of 25¢ per ton. In effect, if Senate Bill 13 were to be enacted we could project that for the year 1975 Montana taxes would be in excess of $1.50 per ton of coal mined. This figure would approximate 30% of the gross mine value of the coal.

We find this proposed tax to be prohibitory. We do not believe that it bears any relationship to the costs to the State of Montana which will result from strip mining. When it is remembered that the State of Montana is already exacting substantial fees to cover the cost of reclamation for lands subject to mining, it becomes clear that the only other legitimate state interest which the

State of Montana has, aside from reclamation, is in the social impact which mining has. We have learned while planning development of our coal reserves that the social implications from mining vary tremendously from operation to operation. Thus for example, there is relatively little social impact from the establishment of a mine when the coal is to be delivered out of state, whereas if there is developed an associated power complex or conversion facility then a substantially increased social impact occurs. We cannot believe, therefore, that simply imposing a large tax against the mining of coal itself can be justified.

To the extent the State of Montana has a legitimate governmental concern about the social and environmental impacts resulting from mining, taxation of that mining to pay the costs resulting from mining is justified. However, we do not believe that the proposed taxes which will result in taxation four times greater than being imposed by any other state, are justified. Rather than imposing an arbitrary and blanket tax on all coal mining, we would suggest that the State establish a method of imposing coal taxes so that the tax imposed would bear a direct relation to the social costs involved in mining and in the associated uses of the coal.

B. Indian Treaty Right Aspects

The Crow Tribe objects to the proposed taxes contained in Senate Bill 13 not only because we believe that they will place Crow coal in an uncompetitive position and are unwarranted in terms of the legitimate state interests involved, but also because the Crow Tribe

believes that this level of taxation is so high that it creates a serious likelihood that Crow coal cannot be marketed. If that is the case, the coal tax becomes an unauthorized state interference with federally secured Indian property. Federal law will not allow such an unauthorized interference. Indeed, in the Montana Enabling Statute, Act of May 21, 1864, Chapter 95, 1st Sess., 38th Cong., the United States conditioned the admission of the State of Montana into the Union on the understanding that the State of Montana would not impair the rights of Indian property and persons existing within its boundaries. This lack of state jurisdiction over Indian property and Indian persons has been recognized on numerous occasions. *Kennerly v. District Court of Montana*, 401 U.S. 423 (1971); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). Indeed, federal law recognizes that Indian property interests are to be likened to private property interests protected from arbitrary taking by the Fifth Amendment to the United States Constitution. *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941); 25 U.S.C. §§ 70, *et seq.*

To the extent that the State of Montana may have a legitimate governmental interest in imposing taxes on Indian mineral development, clearly the State cannot tax beyond a level which is justified in terms of the state costs incurred as a result of such mining. Whatever legal restrictions may be imposed on the State of Montana with respect to the taxation of non-Indian minerals, clearly an even greater limitation exists with respect to the taxation of Indian minerals. Indian minerals have a unique legal status. Unlike coal resources owned by private individuals or by state or federal governments, tribal and individual Indian coal deposits have been reserved by federal

treaties. Pursuant to such treaties these mineral rights are held in trust by the United States for the Indian beneficiaries. The Crow Indian Tribe owns coal reserved by it in treaties with the United States concluded in 1851 and 1868. The reservation of these mineral rights constituted an important consideration to the Tribe in agreeing to cede large areas of territory to the United States. It is these large areas which subsequently became portions of the States of Montana and Wyoming. Imposition of excess state coal taxes would be inconsistent with the provisions of these treaties, and would place the coal tax policies of the State of Montana in conflict with significant federal policies relating to the protection of Indian trust properties and the encouragement of Indian economic development.

We believe there is no justification for allowing the State of Montana to reap a large tax windfall because the State's territory abuts the Reservation of the Crow Tribe which is rich in coal deposits. We have expressed in the past a willingness to work with the State of Montana so as to assure that mining development on or near the Crow Reservation will be undertaken in a way which will minimize the environmental and social impacts. In opposing Senate Bill 13 we do not intend to dislodge the State of Montana from its proper governmental responsibilities – we seek only to demonstrate that the tax levels proposed in Senate Bill 13 bear no relation to legitimate Montana state interests, and threaten to jeopardize the right of the Crow Tribe of Indians to exploit its treaty-reserved trust minerals.

TAXATION COMMITTEE

March 27, 1975

Chairman Ora J. Halvorson called the subcommittee on Senate Bill 13 to order at 8:30 a.m. in room #108, Capitol Building, Helena. Reps. E. N. Dassinger and David Aageson committee members were present.

Amendments, copy of which are marked Exhibit A, attached hereto were discussed. Rep. Dassinger moved that they be not adopted. Motion carried with Reps. Aageson and Dassinger voting Yes, and Rep. Halvorson voting against the motion.

The feeling was that there would have to be court decreed settlements regarding Indian coal revenues.

Rep. Dassinger moved acceptance of an amendment allowing 5,000 tons of coal to be produced in a quarter-year without taxation. Motion carried unanimously.

Rep. Dassinger moved that the pyramiding effect in SB 13 be removed. Motion failed with Reps. Halvorson and Aageson voting No, and Rep. Dassinger voting Yes.

Rep. Halvorson moved that Senate Bill 13 with the suggested amendments come out of the subcommittee with no recommendation. Motion carried with Reps. Halvorson and Aageson for the motion, and Rep. Dassinger against the motion.

Meeting adjourned at 8:50 a.m.

/s/ Ora J. Halvorson
REP. ORA J. HALVORSON,
Chairman

SENATE BILL NO. 13

An amendment to provide a credit against state severance taxes for tax payments made pursuant to a federally approved Indian Tribal Tax.

Be amended in the third reading copy of the bill as follows:

1. Amend page 9, line 5
   Following: "both."

Insert: A new section to be known as Section 13 to read as follows: "Section 13. A credit against the state severance taxes provided for in this chapter shall be granted the producer of coal for each dollar paid an Indian tribe pursuant to an approved tribal tax if the following conditions are met:

(a) The coal produced is held in trust by the United States for the benefit of a federally recognized Indian tribe or Indian allottee,

(b) The coal is produced within the boundaries of a federally recognized Indian reservation,

(c) The Indian tribe has enacted a tribal mineral tax which has been approved by the Secretary of the Interior, and

(d) The revenues received from the tribal mineral tax will be used to upgrade tribal governmental services

2. Amend on page 9, line 6
   Renumbering "13" to become "14"

3. Amend on page 15, line 24
   Renumbering "14" to become "15"

4. Amend on page 16, line 25
   Renumbering "15" to become "16"

5. Amend on page 20, line 6
   Renumbering "16" to become "17"

6. Amend on page 20, line 12
   Renumbering "17" to become "18"

THE FREE JOINT CONFERENCE
COMMITTEES ON COAL TAXATION

April 14, 1975

NOTICE

The conferees on the coal tax bills have authorized the printing and distribution of this report, which reflects their final decisions. However, the conference reports have not been signed yet and this statement is solely for the information of the members of the legislature.

/s/ Roger Tippy
Roger Tippy, Staff Attorney

CONFEREES

FOR THE SENATE:

Dave Manning, Chairman

Thomas E. Towe

William L. Mathers

FOR THE HOUSE:

Ora J. Halvorson, Chairman

Harrison Fagg

Daniel Kemmis (on SB13, SB87)

Thomas Conroy (on SB86, HB663)

E.N. Dassinger (on HB115, HB642)

The free joint conference committees appointed to resolve the differences in Senate Bills 13, 86, and 87 and House Bills 115, 642 and 663, having met every day during the week of April 7-12, recommended that SB13, SB86, and SB87, be further amended and approved, that HB642 and HB663 be approved as amended by the Senate, and that HB115 be postponed, since it contains essentially the same provisions as SB13. The conference committee's recommendations represent a fair compromise of the divergent viewpoints of the individual conferees.

In setting the level of the tax, the conference committee looked at the needs to be met. The objections were to (a) preserve or modestly increase revenues going to the general fund, (b) to respond to current [illegible] impacts attributable to coal development, and (c) to invest in the future, when new energy technologies reduce our dependence on coal and mining activity may decline. The conference concluded that a severance tax of 20% on low-grade lignite and 30% on other coal, plus a gross proceeds tax running at around 4-5% on all coal, was necessary and equitable.

It is true that this is a higher rate of taxation than that levied by any other American state on the coal industry. The tax must be determined on the basis of Montana's needs rather than on other states' response to coal development. Wyoming's supposed competitive advantage has been constantly cited by the coal industry – Wyoming coal taxes appear to be about 7% of the f.o.b. mine price now. When we look south to Wyoming, we should also

look north to Alberta. The province, owning most of its plentiful oil and gas reserves, collects its rent by means of royalty rather than severance tax. Alberta gas that cost 20 cents at the Montana border 18 months ago now costs 99 cents – and all the increase is royalty payments to the province. Alberta is investing its wealth in its universities, hospitals, reduction of other taxes, etc., and the consumers of Alberta gas, in Montana and elsewhere, have no choice but to finance this program. Wyoming keeps its taxes low, attracts a rapid buildup of coal development, and receives a collection of problem-ridden boom towns like Rock Springs and Gillette.

While coal is not as scarce as natural gas, most of the Montana coal now produced is committed for sale under long-term contracts and [illegible] be purchased with this tax added to its price. A tax differential between Montana and Wyoming may shift some new contracts to Wyoming. If the coal industry grows somewhat more slowly in Montana, the small communities in the eastern part of the state will have time to grow in a more orderly fashion. That the coal industry will grow even with this tax is not doubted by the conference committee. The 20% severance tax on lignite, together with the gross proceeds tax, is close to the severance and conversion taxes recently enacted by the North Dakota legislature. The combined coal reserves of Montana and North Dakota are simply too great a part of the nation's fossil fuel resources to be ignored because of taxes at these levels.

The taxes proposed in Senate Bill 13 are constitutionally sound. If the enactment of a tax is within the authority of the Legislature, the level of that tax will not be examined by the courts under the due process clause

(*Pittsburgh v. Alco Parking Corp.*, 417 U.S. ___, 94 S. Ct. 2291). As a tax on an activity or occupation, it is not a burden on interstate commerce (*Oliver Iron Co. v. Lord*, 262 U.S. 172, 179).

The equal protection standards set by the Supreme Court of Montana in *Sigety v. State Board of Health*, 157 Mont. 48, are met in Senate Bill 13. The conference discussed the jurisdiction of the state over coal mined on Indian reservation lands or ceded lands within reservation boundaries such as at Sarpy Creek. Since the tax falls upon an activity or occupation by non-Indians which has not been comprehensively regulated by Congress, there is a suggestion in *Warren Trading Post v. Arizona Tax Commission* (380 U.S. 685, at p. 691 note 18) that such a tax is permissible.

Since the amendments to Senate Bills 13 and 87 proposed by the conference committees are rather extensive, the conference has prepared section-by-section summaries of these bills as reported. The conference agreed to accept the Senate amendments to House Bills 642 and 663, and the reference bills are the recommended versions. The conference agreed to accept the House amendments to Senate Bill 86 and to insert two brief amendments to the bill. These amendments reduce the allocation to alternative energy research and appropriate the moneys allocated in the first biennium for that purpose.

The summaries of SB13 and SB87 are as follows:

Senate Bill 13

Section 1

The findings recite facts supporting the classification of coal into a unique category for taxation purposes and recognize subcategories based upon differences in mining methods (surface or underground) and between types of coal (sub-bituminous, over 7,000 BTU per pound, and lignite, under that BTU rating). The conference reinstated a finding in the introduced bill which states that lignite's market is not as strong or widespread as the market for sub-bituminous. Thus, while sub-bituminous coal producers can afford to pay royalties and production taxes equal to at least one-third of the total price f.o.b. mine, as another conference amendment states, lignite producers can afford less.

Section 2

The determination of coal's value is the most important aspect of the definitions section. The conference agreed to accept the House amendments defining value so as to exclude production taxes. This eliminates the tax pyramiding issue which was debated in the interim study committee report. Production taxes are defined to include the severance and gross proceeds taxes proposed in the bill the resource indemnity trust tax provided under other state law, and possible future taxes such as the reclamation tax proposed in the federal strip mining bill now before Congress.

Section 3

The severance tax rate decided by the conference is 20% of value on low-grade lignite and 30% of value on all grades of coal rated over 7,000 BTU per pound. This is a compromise between the flat 28.5% rate last approved by the House and the 15-30-30-30% rates last voted by the Senate. The conference agreed to the House amendment exempting up to the first 20,000 tons a year produced by any person, whether he operates one or more mines.

Section 4

Section 4 is essentially a restatement of section 84-1306 in the present code. The wording remains as drafted by the interim study committee, except for the last sentence, added by the conference. This sentence is derived from Senate Bill 144 and relates to the penalty and interest provisions of section 5 by allowing the department discretion to extend the filing time for the severance tax before penalties and interest accrue.

Section 5

This section was inserted by the conference to impose a 10% penalty and monthly interest at 1% on delinquent taxes. These provisions were contained in Senate Bill 144, which was held in the House. It was one of a series of department bills (the others have been enacted) adding penalties and interest to the collection procedure, for various license taxes.

Section 6

Section 6, also unchanged from the interim study draft, is a rephrasing of code section 34-1302, subsections (4), (5), and (6).

Section 7

Section 7 sets out the authority of the department of revenue to impute value to coal which is not marketed in an arm's length commercial transaction. The conference amended the bill to clarify that coal used in any manufacturing process (such as the proposed fertilizer plant near Circle) is subject to this section.

Section 8

The disposition section was amended by the House in a house-keeping manner to conform with the treatment of the same section in Senate Bill 87. The codifier is expected to assemble a composite section showing the various earmarked revenue accounts which receive portions of the severance tax, and to insert these as subsections between the county share and the subsection allocating the balance to the general fund. The conference agreed to revise the county's share from 5% to 4% for the period until 1980 and after that, to leave the county's share on a permanent percentage basis at 3½%.

Section 9

This is a reporting section for the purpose of computing the gross proceeds tax. The form for this report could be coordinated with the severance tax reports – gross

proceeds are identical to the annual aggregate value, as derived from the contract sales price, which would appear on four quarters of severance tax returns. The only difference in the value taxed is that the 20,000-ton annual exemption does not apply to the gross proceeds tax.

Section 10

Under this section, the department will aggregate the gross proceeds of all coal mines within a county and report the figures to the county assessor.

Section 11

This section governs the actions of the assessor and treasurer with respect to gross proceeds reports as these officers now handle net proceeds of mines.

Section 12

This section creates a lieu [sic] for unpaid gross proceeds or severance taxes and authorizes the department to take appropriate legal actions to collect the taxes.

Section 13

This section provides criminal penalties similar to those enacted for enforcement of existing coal taxes.

Section 14

This section takes coal out of the first class of property tax purposes of the local property tax – the net proceeds of mines category – and inserts the gross proceeds of an underground coal mine in a class taxed at 33 1/3% of value, and creates a new class for the gross proceeds of a strip coal mine taxed at 45% of value. The classifications thus made are amply buttressed by the findings made in section 1 and should satisfy the equal protection standards applied by any court. The committee intended that the value of gross proceeds is to be placed on assessment rolls at 100% of value as net proceeds of other mines are so placed.

Section 15

This section, as amended by the House and so accepted by the conference, sets the taxable value of strip coal mines at 45% of total value of the gross proceeds. The 45% factor is based upon Department of Revenue calculations that most strip mines have historically deducted about 55% of their gross proceeds before taxes as operating expenses in order to compute net proceeds. A levy of 100 mills, about average in the coal mining districts, makes the gross proceeds tax equivalent to another 4 1/2% on the sale price of the coal.

Section 16

The effect of this section is to remove coal mines from chapter 54, Title 84, which prescribes reporting procedures for the net proceeds tax. Royalties, which are

separately assessed for net proceeds purposes, would not be so treated under this bill. The coal producer's value subject to the gross proceeds tax would include his royalty payments. The producer and the royalty owner would negotiate in their contract such allocation of the gross proceeds tax and severance taxes as they agreed upon.

Section 17

This is a new section inserted by the conference committee. It is based upon the premise that any spiralling effect between percentage royalties and percentage taxes can be eliminated very simply by defining value for royalty purposes as before-tax value, just as value is so defined in the bill for tax purposes. This is established as a policy for the board of land commissioners in future leases of state lands and as a guideline for courts construing Montana law to interpret any coal lease. The changes in state lands royalties enacted by House Bill 533 are superceded [sic] by this section to the extent of any inconsistency between the two statutes.

SENATE BILL 87

Section 1

This is the declaration of purpose. The conference added a reference to the county land planning assistance program created [illegible] Section 14.

Section 2

This section creates the various accounts within the earmarked revenue fund into which portions of the severance tax are paid. The conference added an account to fund county land planning assistance.

Section 3

This is the section which slices the pie. The conference agreed to retain the 4-year program to rebuild highways in the coal development region and to adopt the Senate version of the allocation to the local impact and education account. The county share and the other earmarked accounts were revised. As reported, the bill has two allocation formulas, one for the present and the other for the period beginning January 1, 1980. (The coal area highway improvement ends June 30, 1979.) Taking all allocations made by the various [illegible] into account, the formulas are as follows:

1975-1979	1980 and afterwards
School equalization – 10%	10%
Local impact & education trust – 30%	40%
Coal area highway improvement – 10%	–
County where coal is mined – 4%	3½%
Counties land planning – 1%	–
Alternative energy research – 2½%	4%
Renewable resource development – 2½%	2½%
General Fund – 40%	40%

Section 4

This section establishes a four year program, ending June 30, 1979, to reconstruct twelve segments of primary and secondary highways in a designated area encompassing all or parts of Big Horn, Rosebud, and Treasure counties. The Department of Highways has estimated the work needed on these roads at $52 million dollars [sic]. The anticipated revenue to this account from the coal tax is between $15 million and $16 million over the four years, and federal matching funds from the U.S. Department of Transportation are expected to be available on a 74-26 basis. The roads in question lead to the four major strip mines in the state, and these roads have deteriorated under the heavy pressure associated with mine development. It is equitable to apply a part of the coal tax to reconstruct these roads, for just as the mines have brought about bad roads, the mines and their workers will benefit from good roads.

Section 5

This section deals with the composition of the coal board, the agency which makes grants to benefit local governments impacted by coal development. The conference completely rewrote the section after agreeing that the appointing discretion should basically be in the governor. His discretion is bounded by the requirements that two of the seven members must have expertise in school matters and two others must reside in coal-impacted areas. There are no specific requirements for the other three appointments to the board but in making any of the seven appointments, the governor is to consider the

desirability of having experience in business, public administration, planning and engineering.

The appointments are to be made under the section providing for quasi-judicial boards in the executive reorganization act. The bill does not designate the coal board as quasi-judicial, however, so the requirement in section 82A-112 that one member must be an attorney does not apply to this board. The relevant provisions of 82A-112 provide for four-year terms, senate confirmation of appointments, removal, filling of vacancies, and so forth.

Section 6

This provides for the election of the chairman of the coal board, meetings, and compensation of members ($25 a day plus actual and necessary expenses).

Section 7

This section gives the board powers to administer the grants program. The conference amended subsection (4) to require that a minimum of one-third rather than one-fourth of the money paid into the local impact and education account must remain in the educational trust fund, and after termination of the highway account in 1979, one-half of the account would go to the trust level. Since one-third of 30% is 10%, this amendment brings SB 87 into conformity with SB 177, which was held in the House. After 1980, the educational trust fund will receive a minimum of 20% of total severance tax collections. The conference accepted the House amendments to allow the board to make grants to state agencies to assist local

governments. The conference rejected the House amendment requiring the coal board to consider the availability of matching funds, and in lieu thereof, inserted a provision that the board consider the degree of effort by local governments to deal with impact problems. The conference intends impact to also include consequences within Montana of coal development just outside the borders.

Section 8

This section establishes priorities in the awarding of impact grants by the coal board. At least half the grants must go to counties, towns, and school districts experiencing a population growth of at least 10% in any three-year period since 1972. Subsection (3) provides for the possibility that not all funds available for impact grants may be awarded by stating that unused funds may be appropriated to the educational trust fund. The conference definitely felt that the maximum sums available for local impact grants might not be appropriated for that purpose after the first several years at [sic] adjustments in the impact areas, and that such moneys would automatically revert to the trust fund. The conference added an amendment to clarify that moneys in the educational trust fund could not be appropriated for local impact grants.

Section 9

The conference amended this section to reflect the change of name from Department of Intergovernmental Relations to Department of Community Affairs. The

department is to provide office space and staff for the coal board.

Section 10

This provides procedures for grant applications. The House amendments allowing state agencies to receive a maximum of 5% of grants by the board were accepted by the conference. This sum is intended for use by state agencies only for the purpose of helping local governmental units to analyze and evaluate their own needs for local impact assistance and not for the purposes of providing state services needed as a consequence of coal development.

Section 11

The educational trust fund is established in this section. The conference added an amendment to incorporate one of the features of Senate Bill 177, that 10% of the interest income from the fund must be added to the principal each year. The other 90% is divided on a three-to-one basis between public school equalization aid and the university system.

Section 12

This amends the code section providing for earmarked revenue to state equalization aid. The conference added an amendment reflecting its decision to place 10% of the severance tax (in addition to 3/4 of 90% of the trust fund income) into equalization.

Section 13

This section appropriates funds to the coal board for its first two years of operation. The conference made two amendments. The first reduces the appropriation down to two-thirds of the funds in the local impact and educational trust fund account, to accord with the amendment in section 7 increasing the trust fund percentage. The second directs the coal board to transfer funds to the legislative review committee established by section 15, as needed to fund operations of the committee.

Section 14

This section was added by the conference to fund county responsibilities under House Bill 672, the Economic Land Development Act. 1% of the severance tax is allocated to the Department of Community Affairs until the end of 1979, to be apportioned to the 56 counties of the state on a combined area-and-population basis. The counties are to use the funds for inventorying and classifying lands in order to comply with the provisions of HB 672. Any unused funds revert to the educational trust fund.

Section 15

The conference added this section to create an eight-member bi-partisan legislative review committee to monitor the expenditure of coal tax monies under this bill, Senate Bill 86, and House Bill 642. The conferees feel that the expenditures in some of these new program areas are ventures into unchartered [sic] water. The 1977 legislature

may need to amend the authorizing statutes for these programs. Thus, a continuation of the work of the 1974 joint interim subcommittee, and of the House subcommittee set up during the 1974 session, is an essential part of the entire coal tax package.

AN ORDINANCE CREATING A METHOD FOR THE TAXATION OF COAL BY THE CROW TRIBE OF INDIANS AND KNOWN AS THE CROW TRIBAL COAL TAXATION CODE

Section 1. Title. This ordinance shall be known as the Crow Tribal Coal Taxation Code.

Section 2. Purpose. Since the mining of Crow coal resources represents the perpetual loss of a non-renewable and valuable tribal asset, the Tribe will be indemnified for the extraction of those resources. The receipt of revenue from this tax will allow the Tribe to upgrade and improve governmental services, especially the increase in those services needed to insure against damage to the total social, cultural, economic and environmental well being of the Crow Tribe that may occur as a result of the extraction of coal.

Finally, the imposition of a tax on coal resources will discourage resource waste and thus insure that adequate amounts of mineral resources will be available for future generations of the Crow Tribe. In addition, the revenue of said tax will enable the Tribe to establish, manage and control programs designed to offset the effect of mining of Crow coal.

Section 3. Definitions.

(a) "strip mining" means any part of the process followed in the production of mineral by the open cut method including mining by the auger method or any similar method which penetrates a mineral deposit and removes mineral directly through a series of openings made by a machine which enters the deposit from a surface excavation or any other mining method or process in which the strata or overburden is removed or displaced in order to recover the mineral;

(b) "underground mining" means a coal mining method using shafts and tunnels;
(c) "person" means a person, partnership, corporation, association, or other legal entity, or any political subdivision, or agency of the state;
(d) "operator" means a person engaged in coal mining who removes or intends to remove more than 10 tons of coal from the earth in a period of one year;
(e) "Tribal Council" means the Crow Tribal Council as described in the Crow Constitution and By-law;
(f) "Designated Committee" means a committee specifically appointed to oversee the management of this code by the Crow Tribal Council in accordance with Article I, Section IV of the Crow Constitution and By-laws;
(g) "ton" means two thousand (2,000) pounds;
(h) "contract sales price" means either (1) the price of coal severed and prepared for shipment f.o.b. mine, or (2) a price computed by the Tribal Council under Section 6 of this code;
(i) "Treasury" means Department of Treasury of the United States.

Section 4. Coal Mining Tax. A person engaged in or carrying on the business of coal mining, or engaged in the business or working or operating a coal mine or coal mining property from which marketable or merchantable coal of any kind is severed or produced by means of strip coal mining, or underground mining, whether the person carried on the operations as owner, lessee, trustee, possessor, receiver or in any other capacity, must for the year this code becomes effective and each year thereafter, pay to the Treasury for the use and benefit of the Crow Tribe of Indians, a tax for engaging in and carrying on the operations described above. Said tax shall be paid according to the schedule listed in Section Six (6) below.

Said tax will be imposed on each ton of marketable or merchantable coal severed or produced by means of strip coal mining or underground mining by a person within the Crow Indian Reservation used by him or shipped and delivered by him to another person for shipment, sale, or use by the other person; provided, however, that nothing in this ordinance requires laborers or employees, hired or employed, by a person to mine coal, or to work in or about or in connection with a strip coal mine to pay taxes, nor is work required to be done in prospecting for, or in developing or in opening up a coal mine or coal mining property, considered to be the carrying on of a coal mining business for the purpose of this tax, or the engaging in the business of working or operating of a coal mine.

However, in the event that during the work of developing or opening up a coal mine or coal mining property, coal is severed or produced by means of strip mining or underground mining and sold, then this is considered the carrying on of a strip coal mining business and the engaging in the business of working and operating a strip coal mine.

Section 5. Scope of Tax. The tax described in Section 4 above applies to all persons engaged in or carrying on the business of coal mining within the boundaries of the Crow Indian Reservations. The boundaries of the Reservation shall include the mineral estate held in trust by the United States for the Crow Tribe under that property known as the "Ceded Area" wherein the surface was ceded but the mineral estate was retained by the Act of April 27, 1904; 33 Stat. 352.

Section 6. Amount of Tax. The license tax paid under Section 4 above is computed to be ___% of the value of each ton of coal. For purposes of this section,

value of the coal means the "contract sales price" as defined in Section 3 above.

Section 7. Imputing the Value of Coal. The value of coal may be imputed by the Tribal Council or its designated committee in cases where

(a) the operator of a coal mine is using the produced coal in an energy conversion process, or

(b) a person sells coal under a contract which is not an arm's-length agreement, or

(c) a person neglects or refuses to file a statement and tax return under this chapter, the Tribal Council or its designated committee may impute a value to the coal which approximates fair market value f.o.b. mine. When imputing value, the Tribal Council or its designated committee may apply the factors used by the federal government under 26 U.S.C. section 613, or that provision as it may be labelled or amended, in determining gross income from mining, or the Tribal Council or its designated committee may apply any other or additional criteria it considers appropriate.

Each subject taxpayer shall, upon request by the Tribal Council or its designated committee, furnish a copy of its federal income tax return, with any amendments, filed for the year in which the value of coal is being imputed and copies of any contracts under which it is selling coal at the time. When the estimate of fair market value by the Tribal Council or its designated committee is contested in any proceeding, the burden of proof is on the contesting party.

Section 8. Payment of Tax. Payment shall be made in quarterly installments to the Treasury in trust for the Crow Tribe of Indians for the quarters ending, respectively, March 31st, June 30th, September 30th

and December 31st of each year. Said payment shall be due within 15 days of the end of the respective quarter as listed above.

Section 9. Filing of Statements. Each person engaged in mining coal must, within thirty (30) days of the end of each quarter, file a statement of the gross yield in tons from each coal mine owned or worked by such person in the quarter just ended and the value of all marketable or merchantable coal severed or produced therefrom. In addition, the statement shall include average BTU value of the production and the contract sales price received for the production.

The statement shall be filed with the Chairman of the Crow Tribe, any committee of the Tribe designated to receive same and the Office of Coal Research. Every operator shall keep a record of all coal mined, severed or produced, and of all coal sold or otherwise disposed of by such person, and such records shall at all times during the business hours of the day be subject to the inspection by the Crow Tribal officers and their duly authorized representatives.

Section 10. PENALTY FOR LATE TAX. If any person, shall fail, neglect or refuse to file any statement required by Section 9 above, or shall fail to pay the above tax, within the required time periods, the Crow Tribal Council or its designated committee shall proceed to inform itself regarding the number of tons of marketable or merchantible coal mined, extracted or produced by such person during such quarter and shall determine and fix the mount of taxes due to the tribe from such person for such quarter and shall add to the amount of such taxes, ten percent (10%) thereof as penalty and shall send such statement by certified mail to such persons along with a statement of interest accruing at the rate of eight percent (8%) per

annum from the date of making the statement until the amount is paid.

Section 11. Binding Effect. The provisions of this code shall be binding upon any person or operator engaged in the mining of coal on the Crow Indian Reservation as of the effective date of this ordinances.

Section 12. Jurisdiction. It is the express interest [sic] of this ordinance pursuant to Section 11.1, Title 25, Code of Federal Regulations, to replace or supercede [sic] any or all parts, sections or provisions of Subchapter B, Title 25, Code of Federal Regulations, which may be inconsistent.

Furthermore, any violation of this code will be actionable in the Tribal Court of the Crow Tribe of Indians as either a civil action or a criminal action in the nature of a misdemeanor which said misdemeanor will be punishable by a fine not exceeding five hundred dollars ($500.00) for each such violation.

Section 13. Severability. If a part of this ordinance is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this ordinance is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

RESOLUTION NO. 76-21 A

A RESOLUTION PROVIDING FOR THE ENACTMENT OF AN CROW TRIBAL COAL TAXATION CODE.

WHEREAS, the Crow Tribal Council has the inherent tribal sovereignty so the persons engaged in any business within the boundaries of the Crow Indians Reservation and derives that authority from treaty, federal statute and constitutional provisions;

WHEREAS, the Crow Tribe intends to exercise that basic inherent Tribal sovereignty to tax businesses and persons so engaged in the mining of coal belonging to the Crow Tribe.

WHEREAS, in the exercise of that inherent tribal sovereignty the Crow Tribe has enacted the following attached Ordinance purporting to tax individuals who extract cola belonging to the Crow Tribe on the Crow Indian Reservation including the mineral estate lying under the area known as the ceded strip.

THEREFORE BE IT RESOLVED that the proposed attached ordinances be adopted by the Council as a valid exercise of Crow inherent Tribal soverenignty [sic].

BE IT FURTHER RESOLVED that the taxation rate at which person illegible or engaging in the mining of Crow coal be taxed at the rate of 25% of the contract sales price or defined in the attached ordinance.

BE IT FURTHER RESOLVED that it is the express intent of the Ordinance pursuant to Section 11.1 Title 25 Code of Federal Regulations to replace or supercede [sic] involved parts of that code which may be inconsistent

with the provisions contained in the Crow Tribal Taxation Code.

BE IT FURTHER RESOLVED, that the attached taxation code upon passage by the Tribal Council is immediately forwarded directly to the Secretary of Interior pursuant to Article IV Section 10 of the Crow Constitution.

PASSED, APPROVED AND ADOPTED by the Crow Tribal Council this 31st day of January, 1976, by Unanimous votes for; no votes against passage adoption and approval.

/s/ Patrick Stands Over Bull
Patrick Stands Over Bull,
Chairman
Crow Tribal Council

ATTEST:

_____

Tyrone L. Ten Bear, Secretary
Crow Tribal Council

NOTED:

_____

Acting Superintendent
Crow Indian Agency

_____

[LOGO] WESTMORELAND RESOURCES
2705 Montana Avenue, Post Office Box 1883,
Billings, Montana 59103 (406) 248-7803

Charles E. Brinley
President

March 30, 1976

Mr. Patrick Stands Over Bull
Chairman
Crow Tribe of Indians
P. O. Box 1183
Crow Agency, Montana 59022

Dear Mr. Stands Over Bull:

This is in response to your letter of March 25 concerning a business settlement between Westmoreland Resources and the Crow Tribe in lieu of payment of the tax.

When the amended leases were negotiated between Westmoreland Resources and the Tribe, Westmoreland Resources granted to the Tribe all the financial advantages Westmoreland Resources could afford both from the point of view of its ability to price your coal competitively and from the point of view of Westmoreland's ability to earn a reasonable return on its investment. During the course of those negotiations, the Westmoreland representatives did express a willingness to pass on to the Tribe any amounts by which the burden of the expected state tax could be reduced by the exercise of whatever governmental powers the Tribe may have over the ceded strip. We stressed at that time that any additional payment to the Tribe would have to be in lieu of, rather than in addition to, the state tax. That was the only context in which the subject of a tribal tax was discussed

and we thought it was understood that the terms of the amended leases were to be the final economic settlement between us. Therefore, it is accurate that Crow taxation as an additional tax became a concern in January, 1976.

We have concluded that a business settlement between us is not a viable resolution of the present tax issue.

We suggest, however, that the Crow Tribe consider reinstituting efforts with the Montana Legislature to gain an appropriate share of the current Montana tax. Westmoreland Resources stands ready to work with you in this regard, provided that there would be no increase in the overall tax and provided that the full cost of any proposed arrangement could be passed along to Westmoreland's customers.

This will confirm that we successfully negotiated the termination of the Colorado Interstate Gas Company Option Agreement effective February 26, 1976. This termination satisfies the Tribe's objectives as expressed in section 6(f) in the Tract III lease with respect to that particular Option Agreement.

Sincerely yours,

/s/ Charles E. Brinley
Charles E. Brinley

Vice Chairman
Minerals Committee
Tribal Counsel
Coal Research Office

dlm
CC: Robert Yellowtail, Jr.
Lee Rockabove
Thomas Lynaugh
Michael Ross

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS,)
FOREST HORN, a member of the Crow Tribe and Chairman of The Crow Tribal Council,)
TED HOGAN, a member of the Crow Tribe and Secretary of the Crow Tribal Council,)
JIGGS YELLOWTAIL, a member of the Crow Tribe, and)
BARNEY OLD COYOTE, a member of the Crow Tribe,)
Plaintiffs)
v.)
THE STATE OF MONTANA,)
RAYMON DORE, Director, Montana Department of Revenue,)
MARGARET WHEELER, Treasurer, Big Horn County, Montana,)
BETTY WHALEY, Assessor, Big Horn County, Montana,)
MAY JENKINS, Treasurer, Yellowstone County, Montana,)
CREATH TOOLEY, Assessor Yellowstone County, Montana,)
KAREN VAN HAELE, Treasurer Treasure County, Montana, and)
BERNICE MOERKERKE, Assessor, Treasure County, Montana,)
Defendants)

No. CV-78-110-BLG

(Filed Sep. 29, 1978)

SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, the CROW TRIBE OF INDIANS, *et al.*, by their attorneys, bring this action against the above-named defendants and allege as follows:

JURISDICTION

1. This is a civil action for injunctive and declaratory relief. It arises under Article I, Section 8, Clause 3 of the Constitution of the United States; under the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970); under the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123; under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; under Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 676; and under 42 U.S.C. § 1983. The matter in controversy, exclusive of interest and costs, exceeds the value of ten thousand dollars. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1362. Venue is established under 28 U.S.C. § 1391(b).

PARTIES

2. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by the United States Secretary of Interior. It brings this action on its own behalf and, as sovereign, on behalf of each of its members.

3. Plaintiff FOREST HORN is an enrolled member of the Tribe and Chairman of the Crow Tribal Council; he

is a resident of the Crow Reservation. He brings this action on his own behalf and, as Chairman of the Tribe's governing body, on behalf of each of the Tribe's members.

4. Plaintiff TED HOGAN is an enrolled member of the Tribe and Secretary of the Crow Tribal Council; he is a resident of the Crow Reservation. He brings this action on his own behalf and, as secretary of the Tribe's governing body, on behalf of each of the Tribe's members.

5. Plaintiff JIGGS YELLOWTAIL is an enrolled member of the Tribe; he is a resident of the Crow Reservation. He brings this action on his own behalf and on behalf of each of the Tribe's members.

6. Plaintiff BARNEY OLD COYOTE is an enrolled member of the Tribe. He brings this action on his own behalf and on behalf of each of the Tribe's members.

7. Defendant STATE OF MONTANA (hereinafter "State") is a sovereign State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

8. Defendant RAYMON DORE is Director of the Montana Department of Revenue. He is sued in his official capacity; his official address is: Department of Revenue, Sam W. Mitchell Building, Helena, Montana 59601.

9. Defendant MARGARET WHEELER is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hardin, Montana 59034.

10. Defendant BETTY WHALEY is Assessor of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hardin, Montana 59034.

11. Defendant MAY JENKINS is Treasurer of Yellowstone County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Billings, Montana 59101.

12. Defendant CREATH TOOLEY is Assessor of Yellowstone County, Montana. He is sued in his official capacity; his official address is: County Courthouse, Billings, Montana 59101.

13. Defendant KAREN VAN HAELE is Treasurer of Treasure County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hysham, Montana 59038.

14. Defendant BERNICE MOERKERKE is Assessor of Treasure County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hysham, Montana 59038.

STATEMENT OF THE CLAIM

15. The Constitution of the United States, Article I, Section 8, Clause 3, grants to the Congress of the United States exclusive authority over the regulation of commerce with Indian Tribes. That authority – which includes the power to tax Indians and Indian property – resides exclusively in the Congress, and only Congress can authorize a state or state-delegated body or official to exercise any portion of that power.

16. This exclusive jurisdiction was reaffirmed by the Mandan Village Treaty of August 4, 1825, 7 Stat. 266, II Kappler 244; by the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749, II Kappler 594, IV Kappler 1067; by the

Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; and by Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 676, pursuant to which the defendant State was admitted to the Union. It was expressly recognized by the defendant State in Section 2 of Ordinance 1 of the 1889 Constitution of the State of Montana and is today recognized in Article I of the 1972 Constitution of the State of Montana.

17. By the Fort Laramie Treaty of 1851, the United States recognized the aboriginal title of the Crow Indians to some 38,531,174 acres of land located in the Territories of Montana and Wyoming. The Fort Laramie Treaty of 1868 drastically reduced the territory by some 30,530,764.8 acres, leaving the Crow Indians with title to some 8,000,409.2 acres. That treaty guaranteed that this remaining land "shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Crow] Indians. . . . " 15 Stat. 650, II Kappler at 1008.

18. The Crow Reservation was further reduced in size by the Act of April 11, 1882, 22 Stat. 42; by the Act of July 10, 1882, 22 Stat. 157; and by the Indian Appropriation Act of March 3, 1891, 26 Stat. 989.

19. By the Act of April 17, 1904, 33 Stat. 352, a certain portion of the Crow Reservation – known as the "ceded area" – was opened to allotment and non-Indian settlement. The mineral estate underlying the "ceded area" was never disposed of pursuant to that Act; it remains part of the Crow Reservation. Legal title to the mineral estate is vested in the United States as trustee for the plaintiff Tribe; beneficial title remains in the Tribe.

20. Congress has never authorized the defendant State of Montana to tax the property of the plaintiff Tribe held in trust by the United States, and the Tribe has never assented to such taxation. The defendant State has never amended its Constitution to assume jurisdiction of any kind pursuant to 25 U.S.C. § 1322 (1970) or the Act of August 15, 1953, Pub. L. No. 280, §§ 6, 7, 67 Stat. 588, 590.

21. In 1975, the defendant State enacted into law a statute, Ch. 525, L. 1975, Rev. Codes of Mont. §§ 84-1312 through 84-1325 (1977 Cum. Supp., v. 5, pt. 2), pursuant to which it purports to impose a severance tax "on each ton of coal produced in the state," [Rev. Codes of Mont. § 84-1314 (1977 Cum. Supp., v. 5, pt. 2)], and a gross proceeds tax upon the proceeds of all sales of coal mined in the state. [Rev. Codes of Mont. § 84-1322 (1977 Cum. Supp., v. 5, pt. 2)].

22. Defendants, Dore, Wheeler, Whaley, Jenkins, Tooley, Van Haele and Moerkerke are the state and county officials charged by Montana law with the enforcement, assessment and collection of the Montana coal severance and gross proceeds taxes.

23. There are approximately 6,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Reservation. The Crow people retain a significant degree of tribal culture, maintaining the Crow language and Crow tribal ceremonies and customs. The Crow people to date have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status.

The development of tribal coal offers an unprecedented opportunity for the Crow people to improve their economic situation.

24. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying considerable amounts of the Crow Reservation, including the "ceded area." In all, the plaintiff Tribe is the beneficial owner of approximately six billion tons of coal.

25. Because the United States holds the Crow tribal lands, including the Crow coal resources in trust for the Tribe, it manages and supervises those trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

26. Since 1967, pursuant to the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123, the United States Secretary of the Interior and the Commissioner of the BIA (now the Assistant Secretary of the Interior for Indian Affairs) have actively recommended, advised and approved transactions which have brought the Crow coal resources close to a point of massive development. In bringing these transactions about, the general practice of the Department of the Interior and the BIA since 1968 has been to (i) advertise for bids for two-year prospecting permits; (ii) recommend and approve two-year permits, containing exclusive options to lease, to successful bidders; (iii) recommend and approve two-year extensions of the permits with options to lease, as requested by permittees; and (iv) recommend and approve conversion of the permits into coal mining leases.

27. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale of prospecting permits covering Crow coal underlying 34,671 acres. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. Westmoreland is the only lessee currently mining Crow coal.

28. The BIA has also approved prospecting permits on the Crow Reservation to Gulf Oil Company, Peabody Coal Company, Shell Oil Company (hereinafter "Shell"), and American Metal Climax, Inc. (hereinafter "AMAX"). It has approved renewals of all those permits for two years. Additionally, it has approved the conversion of the Shell and AMAX permits into leases. The validity of the BIA's approval of those permits and leases is currently the subject of litigation in Crow Tribe of Indians v. Andrus, CV-76-10-BLG, D. Mont. (Billings Division).

29. The plaintiff Tribe is also the beneficial owner of other extensive coal deposits which it has not yet undertaken to develop. One such deposit underlies that portion of the reservation proper commonly known as the "reserve area."

30. On January 31, 1976, the plaintiff Tribe enacted its own tribal coal taxation code, which imposes upon persons mining Crow coal a severance tax of 25 percent of the value of Crow coal mined by such persons, including the lessees identified in paragraphs 27 and 28 of this

Complaint. On January 17, 1977, the Secretary of the Interior approved the Crow taxation code to the extent that it applied to coal underlying the Crow Reservation proper.

31. On March 3, 1978, the Assistant Secretary of the Interior disapproved, on procedural grounds, an amendment to the Crow Constitution which would have had the effect of applying the tribal tax ordinance to the removal of coal underlying the "ceded area." The plaintiff Tribe has undertaken to comply with all procedural requirements, and will soon amend its Constitution so as to extend its tax ordinance to embrace all Crow coal underlying the "ceded area." Approval of the Tribe's taxation of "ceded area" coal will be sought immediately thereafter.

32. The Crow tribal severance tax, enacted in an exercise of the Tribe's sovereignty and approved by the Secretary of the Interior pursuant to congressionally delegated authority in the implementation of federal policy, preempts state taxation of the subject coal.

33. Pursuant to Section 84-1315 of the Revised Codes of Montana, Westmoreland – the only lessee actively mining Crow coal – has, since 1975, computed and paid on a quarterly basis the state severance tax imposed by Section 84-1314. Because the Westmoreland mining operation involves surface mining of high-quality coal, it has been required by the defendant State to pay a tax equal to 30 percent of the value of all Crow coal it has mined. Through March 31, 1978, Westmoreland paid $15,481,262.23 in severance taxes to the defendant State.

In that same period of time, Westmoreland paid only $5,524,638.68 to the plaintiff Tribe in royalties.

34. Since 1976, Westmoreland also has reported (on an annual basis) gross proceeds from its sales of Crow coal, pursuant to Section 84-1320 of the Revised Codes of Montana, and has paid (also on an annual basis) the gross proceeds tax imposed by Section 84-1322 of the Revised Codes of Montana. At the present time, plaintiffs are without knowledge of the amounts of gross proceeds taxes Westmoreland has been required to pay on the proceeds from its sales of Crow coal.

35. The imposition, assessment and collection of the 30-percent state severance tax and the gross proceeds tax have imposed a direct and severe burden upon the plaintiff Tribe in that the taxes are a direct and major cost associated with the production of Crow coal by Westmoreland.

36. The natural and immediate consequences of the imposition, assessment and collection of these taxes have been: (i) drastically increased costs to purchasers of Crow coal; (ii) a correspondingly severe restriction upon the amount of royalty payments which Westmoreland has been willing to pay to the plaintiff Tribe under its leases; and (iii) the frustration of efforts by the Tribe to renegotiate its leases with Westmoreland. The state severance and gross proceeds taxes have already adversely affected the competitive status of Crow coal, and, when taken in conjunction with the Crow tribal tax, may increase the cost of Crow coal so drastically as to render that coal noncompetitive in the marketplace and thereby threaten to preclude further Crow coal development.

37. The existence of the 30-percent state severance tax and the gross proceeds tax has frustrated efforts by the Tribe to negotiate (or renegotiate) leases with the other Crow permittees and lessees – Shell, Peabody, Gulf, and AMAX – and has severely depressed the amount of royalties which those permittees and lessees are willing and able to pay to the Tribe under any such leases or pursuant to other arrangements.

38. The existence. of the 30-percent state severance tax and the gross proceeds tax has also frustrated efforts by the Tribe to offer permits and leases covering additional coal deposits in the "reserve area" and elsewhere on the reservation. It has also rendered the Tribe incapable of entering into any fair arrangements for the development of tribal coal or of developing its own coal pursuant to mining contracts with persons capable of performing the actual mining of such coal.

39. The imposition, assessment and collection of the 30-percent state severance tax and the gross proceeds tax upon Crow coal held in trust by the United States have: (i) illegally subjected the property of the sovereign Crow Tribe to an unauthorized state tax, in violation and/or derrogation of Article I, Section 8, Clause 3 of the United States Constitution; the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123; the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; and Section 4 of the Enabling Act of February 22, 1889, 22 Stat. 676; (ii) illegally reduced the ability of the sovereign Crow Tribe and its members to realize full benefit, use and development of

their land, thereby depriving them of liberty and property without due process of law, in violation of the fourteenth amendment of the United States Constitution and of the Tribe's civil rights and the civil rights of its members; (iii) illegally threatened the ability of the sovereign Crow Tribe to exercise its sovereignty through its lawful tribal tax; (iv) illegally and severely infringed upon the right and ability of the sovereign Crow Tribe to govern itself and its people; and (v) illegally and severely impaired the ability of the sovereign Crow Tribe to serve its people through its various tribal programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services.

40. Prior to and since the enactment of the challenged tax laws, Crow tribal representatives, by correspondence and by testimony before the Montana legislature, have consistently protested the imposition of these unlawful taxes upon Crow coal, to no avail.

41. Plaintiffs are without recourse to any remedies other than those sought by this Complaint and, unless such relief is granted, they will continue to suffer immediate and irreparable injury.

WHEREFORE, plaintiffs demand judgment

1. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe, and a gross proceeds tax upon the sale of such coal, are violative of Article I, Section 8, Clause 3

of the United States Constitution and are therefore unconstitutional, null and void;

2. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, deprive the Tribe and its members of rights secured to them by the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123, and are therefore null and void;

3. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severence tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, deprive the Tribe and its members of rights and property secured to them by the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008, and are therefore null and void;

4. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, are violative of Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 676, and are therefore null and void;

5. Declaring that the defendants' imposition, assessment and collection of an unconstitutional and illegal

severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, pursuant to Sections 84-1312 through 84-1325 of the Revised Codes of Montana, deprive the Tribe and its members of liberty and property without the protection of due process of law, in violation of the fourteenth amendment of the United States Constitution and in violation of the civil rights of the plaintiffs and other members of the plaintiff Tribe;

6. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, (i) unlawfully impair the right of the plaintiff Tribe to self government and (ii) are preempted by the Tribe's own lawfully enacted severance tax, and are therefore null and void;

7. Enjoining the defendants, their agents, servants, employees, and attorneys from enforcing and/or taking any action pursuant to Sections 84-1312 through 84-1325 of the Revised Codes of Montana which would result directly or indirectly in the imposition, assessment or collection of a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe or a gross proceeds tax upon the sale of such coal;

8. Ordering that the defendants pay to the plaintiffs the costs of this litigation, including attorneys' fees; and

9. Awarding to the plaintiffs such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Richard Anthony Baenen
Richard Anthony Baenen

/s/ Edward M. Fogarty
Edward M. Fogarty

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(Certificate Of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al.	:	CIVIL ACTION
	:	
v.	:	NO. CV-78-110-Blg
	:	
THE STATE OF MONTANA, et al.	:	
	:	

PROPOSED ANSWER OF INTERVENING DEFENDANT WESTMORELAND RESOURCES, INC. TO PLAINTIFFS' SECOND AMENDED COMPLAINT, INCLUDING COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFFS, AND CROSS-CLAIM FOR INJUNCTIVE AND DECLARATORY RELIEF AGAINST DEFENDANTS

Westmoreland Resources, Inc. ("Westmoreland") proposes the following answer to plaintiffs' Second Amended Complaint:

1. Admitted that this Court has jurisdiction over this controversy and that venue is proper. It is further averred that this Court has pendent and ancillary jurisdiction.

2-18. Admitted as to statements of fact, except denied that the Tribe has all the attributes of sovereignty, denied that it has any sovereign or governmental authority in the Ceded Area, and denied that it has any sovereign or governmental authority to tax Westmoreland or its activities. To the extent that plaintiffs aver conclusions of law, no answer is required.

19. Admitted, except that Westmoreland denies that the mineral estate underlying the "Ceded Area" remains a part of the Crow Reservation and is without knowledge or information sufficient to form a belief as to whether or not the mineral estate underlying the "Ceded Area" was disposed of pursuant to the Act of April 27, 1904. Pursuant to the said Act, the Ceded Area ceased to be a part of the Crow Reservation and the Tribe and its members relinquished any and all sovereign or governmental authority over the Ceded Area where Westmoreland leases and mines coal.

20. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 20 of plaintiffs' Second Amended Complaint.

21-22. Admitted.

23. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 23 of plaintiffs' Second Amended Complaint.

24. Denied that the Ceded Area where Westmoreland leases and mines coal is a part of the Crow Reservation or that the Tribe or its members have any sovereign or governmental jurisdiction over it. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averment concerning the amount of coal in which the Tribe and its members have a beneficial interest. Otherwise admitted.

25. Admitted that the United States holds in trust for the Tribe and its members minerals underlying the

Ceded Area where Westmoreland leases and mines coal. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 25 of plaintiffs' Second Amended Complaint.

26. Admitted that the United States Secretary of Interior and the Commissioner of the BIA (now the Assistant Secretary of Interior for Indian Affairs) have actively recommended, advised and approved transactions which have brought the Crow coal resources in which Westmoreland has an interest close to a point of massive development, pursuant to the Mineral Leasing Act of 1938, as amended. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 26 of plaintiffs' Second Amended Complaint.

27. Admitted.

28-29. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 28 and 29 of plaintiffs' Second Amended Complaint.

30. Admitted that the Tribe and its members enacted their own tribal coal taxation code on or about January 31, 1976 which purported to subject Westmoreland to a coal severance tax. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 30 of plaintiffs' Second Amended Complaint.

31. Admitted that on or about March 3, 1978, the Assistant Secretary of Interior disapproved, on procedural grounds, an amendment to the Crow Constitution which purports to have the effect of applying the tribal taxation ordinance to the removal of coal underlying the Ceded Area. Further admitted that the Tribe and its members will undoubtedly seek to comply with all procedural requirements; will undoubtedly soon seek to amend their Constitution so as to extend the Tribal tax ordinance to embrace all coal underlying the Ceded Area; and will undoubtedly seek approval of their taxation of ceded area coal immediately thereafter.

32. Admitted that the Secretary of the Department of Interior exercises certain Congressionally delegated authority over the leasing of Indian lands for mining purposes. Westmoreland denies that the Tribe or its members have any authority, sovereign or otherwise, to enact a coal tax applicable to Westmoreland or its mining activities in the Ceded Area, whether or not the Ceded Area is part of the Reservation. Westmoreland further denies that the Secretary of Interior has any authority to approve a tribal coal tax insofar as it applies to Westmoreland.

33. Denied that the royalty payments to the Tribe for the period in question have been $5,524,638.38. On the contrary, the amount paid for that period has been some $5,684,834 and the amount paid through May 31, 1978 has been some $6,240,039. Denied to the extent plaintiffs are alleging that the coal is of any higher quality than subbituminous. Otherwise admitted.

34. Admitted, except that Westmoreland is without knowledge of information sufficient to form a belief as to

the knowledge, if any, of plaintiffs to the amounts of gross proceeds taxes paid by Westmoreland.

35. Admitted that the state severance tax is a direct and major cost associated with its production of Crow coal. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 35 of plaintiffs' Second Amended Complaint.

36. Admitted that the imposition, assessment and collection of the state severance tax has drastically increased costs to purchasers of the coal that is mined by Westmoreland in the Ceded Area. Further admitted that the state severance tax and gross proceeds tax have already adversely affected the competitive status of the Crow coal mined by Westmoreland, and that, when taken in conjunction with any Crow Tribal tax, will increase the cost of the Crow coal mined by Westmoreland so drastically as to render the coal non-competitive in the market place, thereby undoubtedly precluding further development of this coal by Westmoreland. Otherwise denied.

37-38. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 37 and 38 of plaintiffs' Second Amended Complaint.

39. Admitted to the extent paragraph 39 of the Second Amended Complaint alleges that the state severance tax and gross proceeds tax are illegal because they interfere with and upset the Federal government's comprehensive regulatory scheme governing the leasing for mining purposes of lands in which Indians have an interest. Denied to the extent paragraph 39 of the Second

Amended Complaint alleges that the state severance tax and gross proceeds tax on Westmorelands coal mining operations in the Ceded Area are illegal because the Ceded Area is a part of the Reservation or because Westmoreland's mining operation is subject to any authority of the Tribe and its members to tax. Otherwise, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 39 of plaintiffs' Second Amended Complaint.

40-41. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 40 and 41 of plaintiffs' Second Amended Complaint.

First Affirmative Defense

Plaintiffs are barred by collateral estoppel and res judicata from asserting any claim that the Ceded Area, where Westmoreland mines and leases coal, is part of the Crow Reservation.

Second Affirmative Defense

Plaintiffs are barred by contract, by estoppel, and by the equal protection and due process provisions of the Indian Civil Rights Act from any claim that they have authority to tax Westmoreland or its mining activities.

Third Affirmative Defense

Plaintiffs have no authority, sovereign or otherwise, to tax Westmoreland or its mining activities in the Ceded Area.

WHEREFORE, intervening defendant Westmoreland respectfully requests that the relief sought by plaintiff Tribe and its members be denied, to the extent that said relief is premised on any allegation or contention: that the Ceded Area, where Westmoreland has coal leases and is mining coal, is a part of the Reservation; or that the Tribe and its members have power or authority to tax Westmoreland or its mining activities in the Ceded Area.

COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFFS

The allegations of paragraphs 1 through 14 of plaintiffs' Second Amended Complaint and the answers thereto of intervening defendant Westmoreland Resources, Inc. ("Westmoreland"), are incorporated herein by reference.

2. Westmoreland is a Delaware corporation, with its principal place of business in Billings, Montana, and is the successor to Westmoreland Resources, a partnership. It is engaged in the production and sale of coal on what is known as the Ceded Strip or Ceded Area, near Hardin, Montana and north of the Reservation of the plaintiff Crow Tribe of Indians ("Tribe").

3. Westmoreland is a non-Indian entity.

4. On June 6, 1972, Westmoreland entered into leases with the Tribe for the mining of coal underlying

some 30,876 acres of land in the Ceded Area (the "leases"). Pursuant to 29 C.F.R. Part 171, these leases were approved by the Secretary of Interior as trustee for the Tribe and its members, who have a beneficial, but not a governmental or sovereign, interest in the mineral rights underlying said land.

5. The leases were amended on November 26, 1974 to provide for substantial increases in the royalties paid to the Tribe. They were approved by the members of the Tribe and by the Secretary of Interior and are presently in effect.

6. As of May 31, 1978, Westmoreland has paid some $6,240,039 to the Tribe in royalties.

7. Subsequent to execution of the amended leases, defendant State of Montana (the "State") enacted a coal severance tax and a gross proceeds tax which require Westmoreland to pay to the State and to Big Horn County, Montana approximately 26% of the f.o.b. mine price of the coal produced under its leases with the Tribe. §84-1312, et seq., R.C.M. (1977 Cum. Supp., v. 5, pt. 2).

8. Westmoreland has paid Montana some $15,481,262 to the State in coal severance taxes since the tax was first imposed on July 1, 1975, and some $1,707,320 to Big Horn County, Montana in gross proceeds taxes since that tax was first collected in 1976. The payment of coal severance taxes to the State for the quarter ending March 31, 1978 made under protest pursuant to §84-4502, R.C.M. 1947.

9. As set forth in plaintiffs' Second Amended Complaint, ¶¶ 30 and 31, the Tribe and its members are

actively taking steps toward the imposition of a coal severance tax of 25% on the value of the coal being mined by Westmoreland under the amended leases. If both the Indian and Montana taxes were in effect, Westmoreland would be required to pay at the confiscatory rate of at least 55%.

10. The Ceded Area, and the coal lying beneath it, were once, but are not presently, a part of the Crow Reservation.

11. In 1899 the Tribe and the Department of Interior negotiated an agreement that ceded all right, title and interest in these lands, to the United States. This agreement, as amended, was subsequently adopted by Congress as the Cession Act of April 27, 1904, 33 Stat. 352, and terminated the sovereign governmental authority of the Tribe and its members over the area, including its subsurface mineral rights. This statute left the Tribe and its members with only a beneficial proprietary interest in the mineral rights underlying the Ceded Area.

12. Since 1904, the Tribe and its members have never exercised or attempted to exercise any sovereign or governmental authority over the surface of the Ceded Area or more particularly over the approximately 30,876 acres of the Ceded Area where Westmoreland is mining coal or has leases to mine coal.

13. Since 1904, the Tribe and its members have (a) *never* exercised or attempted to exercise any police power with respect to the Ceded Area; (b) *never* regulated or attempted to regulate the sale or consumption of liquor in the Ceded Area; (c) *never* established or attempted to establish electoral districts encompassing the Ceded

Area; and (d) *never* exercised or attempted to exercise any authority or control over fishing and hunting in the Ceded Area.

14. Since 1904, the Tribe and its members have never exercised or attempted to exercise any sovereign or governmental authority over the subsurface of the Ceded Area, except for their recent attempt to tax Westmoreland's mining activities there.

15. The Tribe's Constitution does not presently and has never specifically referred or applied to the Ceded Area.

16. Since the interest of the Tribe and its members in the mineral rights underlying the Ceded Area is simply beneficial or proprietary in nature and carries with it no sovereign or governmental authority, the Tribe and its members have no power to impose a severance tax on Westmoreland's coal mining operations on or underlying these lands.

17. The Tribe and its members have no right to impose any tax upon Westmoreland, whether or not the Ceded Area is part of the Reservation, since the Tribe and its members have no power or authority to tax a non-Indian entity such as Westmoreland, wherever located.

18. The negotiations between the Tribe and Westmoreland for substantially increased royalties, which culminated in the amended leases of November 26, 1974, also resulted in a Settlement Agreement of that date, which was approved by the Secretary of Interior and by the members of the Tribe.

19. Under paragraph 4(b) of this Settlement Agreement and in the Tribal resolution approving the amended leases and Settlement Agreement, the Tribe and its members agreed that the Settlement Agreement "provides the financial, economic, and social protections that the Tribe deems necessary."

20. The Tribe and its members are therefore barred by contract, by principles of estoppel, and by the due process and equal protection provisions of the Indian Civil Rights Act, 25 U.S.C. §1301-03 from imposing any taxes on Westmoreland or its mining activities.

21. The plaintiffs are further barred by principles of collateral estoppel and res judicata from litigating the status of the Ceded Area, since in previous judicial proceedings in which the Crow Tribe was a party, it was determined that the Ceded Area is not part of the Reservation.

22. The question as to whether the Ceded Area is a part of the Reservation and whether Westmoreland and its mining operations are subject to any taxing authority of the Tribe and its members as well as the question of the State's authority to impose a coal severance tax or gross proceeds tax on Westmoreland have been put in issue, in this lawsuit, by the allegations of plaintiffs' Second Amended Complaint.

23. Any ruling that the Ceded Area is part of the Reservation would cause Westmoreland irreparable harm, in that it would materially advance the stated intention of the Tribe and its members to impose a burdensome tax on Westmoreland's mining operations in the

Ceded Area and could lead to confiscatory double taxation.

24. Any ruling that the Tribe can tax Westmoreland would likewise cause it irreparable harm.

25. Westmoreland has a vital interest, as lessee of Ceded Area land and mineral rights and as a company mining coal there, in the authority of the Tribe and its members to impose taxes upon it.

26. Westmoreland has no adequate remedy at law.

WHEREFORE, Westmoreland requests this Court:

(a) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that the Ceded Area, both surface and subsurface, where it has coal leases and is mining coal, is not part of the Reservation;

(b) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that the Tribe and its members have no power or authority to tax Westmoreland or its mining activities in the Ceded Area;

(c) to grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

CROSS-CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST DEFENDANTS

COUNT I

1-26. The allegations of paragraphs 1 through 26 of intervening defendant Westmoreland Resources, Inc.'s ("Westmoreland") Counterclaim for Declaratory Relief Against Plaintiffs, are incorporated herein by reference.

WHEREFORE, Westmoreland prays the Court:

(a) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that the Ceded Area, both surface and subsurface, where it has coal leases and is mining coal, is not part of the Reservation;

(b) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that the Tribe and its members [sic] have no power or authority to tax Westmoreland or its mining activities in the Ceded Area;

(c) to grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

COUNT II

1. The allegations of paragraphs 1 through 6 of Westmoreland's Counterclaim for Declaratory Relief Against Plaintiffs, are incorporated herein by reference.

2. Defendant State of Montana (the "State") has enacted a coal severance tax and a gross proceeds tax which require Westmoreland to pay to the State and Big Horn County, Montana approximately 26% of the f.o.b. mine price of the coal produced under its leases with plaintiff Crow Tribe of Indians (the "Tribe"). §84-1312, et seq., R.C.M. 1947.

3. Westmoreland has paid Montana some $15,481,262 to the State in coal severance taxes since the tax was first imposed on July 1, 1975, and some $1,707,320 to Big Horn County, Montana in gross proceeds taxes since that tax was first collected in 1976. The payment of coal severance taxes to the State for the

quarter ending March 31, 1978 was paid under Protest pursuant to §84-4502 R.C.M. 1947.

4. On June 20, 1978, various utilities and coal producers, including Westmoreland, filed suit in the District Court for the First Judicial District of Montana challenging the State's coal severance tax as violative of the interstate commerce clause of the U.S. Constitution and on certain preemption grounds. *Commonwealth Edison Co., et al. v. State of Montana, et al.*, No. 42657, filed in the District Court for the First Judicial District of the State of Montana, in and for the County of Lewis and Clark (the "State court suit").

5. Since Westmoreland is the only plaintiff in the State court suit which is mining coal under a lease with an Indian Tribe and since the Tribe is not a party to that action, Westmoreland has not contended therein that the State coal severance tax is invalid for the reasons set forth below, since these reasons are peculiarly applicable to the situs of Westmoreland mining on land as to which the Tribe or its members have a beneficial interest.

6. The Tribe and its members have a beneficial interest in the coal being mined by Westmoreland underlying the Ceded Area.

7. The leasing of lands owned by the Tribe and its members for mining purposes, whether or not the land is part of the Crow Reservation, is subject to the plenary power of Congress over Indian tribes and the power of Congress to regulate commerce with Indian tribes.

8. Pursuant to these powers, Congress has passed a comprehensive regulatory scheme that governs the leasing of Indian-owned land for mining purposes, and for oil and gas production, even though that land is not part of a reservation. This regulatory scheme governs what can be mined, how, and at what compensation to the Indians.

9. All operations under any oil, gas, or mineral lease issued pursuant to any act affecting restricted Indian lands are subject to the rules and regulations of the Department of the Interior. 25 U.S.C. §396(d). The regulations issued by the Department of the Interior govern, among other things, acreage limitations for any one lease, the terms of the lease, royalty payments, the time and manner of royalty payment, diligence in drilling or mining, and the prevention of waste, restriction on operations, penalties assignments and overriding royalties and inspection of records. *See* 25 C.F.R. §§171-184. All leases must be approved by the Department of the Interior.

10. The regulatory scheme also encompasses the circumstances under which states can impose taxes on mining operations. In 1924, Congress specifically provided that oil and gas production on certain unalloted Indian lands could be taxed by the state in which the lands were located. 25 U.S.C. §§398, 401. When Congress passed the act which governs the leases executed by the Crow Tribe and Westmoreland, in 1938, no consent was given for state taxes on mining leases or operations. 25 U.S.C. §396(a) et seq.

11. Mining on the Ceded Area, although not a part of the Crow Reservation, comes within the aforesaid regulatory scheme of the federal government. Westmoreland entered into these leases pursuant to 25 C.F.R. Part 171.

12. The State's coal severance tax and gross proceeds tax, §84-1312 et seq., R.C.M. (1977 Cum. Supp., v. 5, pt. 2), as they are applied to Westmoreland's mining operation in the Ceded Area, are barred under the Supremacy Clause of the United States Constitution, and the Doctrine of Pre-emption.

13. The grounds for challenging the State's coal severance tax which were set forth in the State lawsuit provide additional grounds for invalidating the State's taxes as they apply to Westmoreland and its mining operation.

14. The State's coal severance tax and gross proceeds tax have and will continue to cause Westmoreland irreparable harm.

15. Westmoreland has no adequate remedy at law.

WHEREFORE, Westmoreland requests the Court:

(a) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that defendants have no power to impose the State's coal severance tax and gross proceeds tax on Westmoreland with respect to its mining operation in the Ceded Area;

(b) to enjoin defendants from imposing or collecting the State's coal severance tax and gross proceeds tax on coal from Westmoreland with respect to its mining operation in the Ceded Area; and

(c) to grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

/s/ R. H. Bellingham
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/s/ Harvey Bartle, III
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Attorneys for Intervening Defendant Westmoreland Resources, Inc.

DATED: October 5, 1978

CERTIFICATE OF SERVICE

I, R. H. BELLINGHAM, Attorney for Westmoreland Resources, Inc. hereby certify that copies of the foregoing PROPOSED ANSWER OF INTERVENING DEFENDANT WESTMORELAND RESOURCES, INC. TO PLAINTIFFS' SECOND AMENDED COMPLAINT INCLUDING COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFFS, AND CROSS-CLAIM FOR

INJUNCTIVE AND DECLARATORY RELIEF AGAINST DEFENDANTS, were mailed, postage prepaid, this 5th day of October, 1978, to the following persons:

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/s/ R. H. Bellingham
R. H. BELLINGHAM

AGREEMENT

COAL MINING

CROW INDIAN RESERVATION

This Agreement is made and entered into on this 8th day of May, 1980, between the CROW TRIBE OF INDIANS, Crow Agency, Montana 59022, hereinafter called "Tribe", and SHELL OIL COMPANY, P. O. Box 2099, Houston, Texas 77001, hereinafter called "Shell". The Tribe and Shell are sometimes referred to individually as "Party" and collectively as "Parties".

WITNESSETH:

WHEREAS, in 1968, as a result of a competitive sale, Shell acquired a Prospecting Permit from the Tribe authorizing Shell to prospect for coal on certain lands described therein for a term ending June 5, 1970. By Extension Agreement dated July 21, 1969, the term was extended through June 5, 1972; and

WHEREAS, the Tribe, as Lessor, executed and delivered to Shell, as Lessee, a Coal Mining Lease dated June 5, 1972, which was approved by the Superintendent on June 8, 1972, which Coal Mining Lease covered 30,247.68 acres, more or less, located within the Crow Indian Reservation in Big Horn County, Montana; and

WHEREAS, in reliance on this lease Shell initiated development activities and executed coal sales contracts; and

WHEREAS, by Resolution dated July 13, 1974, the Tribe, acting through the Crow Tribal Council, declared that all coal mining leases, whether existing or pending,

are unlawful, null and void and are not binding on the Tribe; and

WHEREAS, there is pending in the United States District Court for the District of Montana Civil Action No. CV 76-10 in which the Tribe, as Plaintiff, asked the

* * *

Article 18 Crow Sovereignty

18.01 General Principles

18.01.01 Shell recognizes the sovereignty of the Tribe as established by Federal law, and the Tribe's ability to legislate in certain areas affecting Mining Activities on the Reservation. Shell specifically acknowledges the authority of the Tribe to enact Tribal legislation relating to Mining Activities, including the Tribal Employment Rights Ordinance, the Health and Sanitation Code and the Land Use Zoning Code. The Parties recognize that the responsibilities of the Tribe as a sovereign include but are not limited to the protection of the health and general welfare of the Tribe and its members, the quality of the environment, the protection and conservation of Tribal resources as well as those responsibilities that eminate [sic] from unique cultural interests. The Tribe recognizes the competitive nature of mining and the need for Coal mined on the Reservation ("Crow Coal") to be competitive in the marketplace with other Coal mined or to be mined off the Reservation within Montana pursuant to Federal or State leases ("Montana Coal"). The Tribe may adopt laws that impose reasonable additional costs so long as the total of

all externally imposed costs associated with Mining Activities (excluding the cost of Shell's regular staff required for reporting to the Tribe as a government) whether imposed by the Tribe, the United States, the State or local government ("Governmental Costs") will not exceed the Governmental Costs associated with the mining of Montana Coal. Also while making no representation as to the quality, quantity or location of any Coal reserves subject to this Agreement, the Tribe agrees they will take no action which precludes Shell from mining Crow Coal covered by this Agreement which otherwise could be mined under State or Federal law, nor will the Tribe enact any law, ordinance, or regulation ("Law") which would conflict with Shell's rights under this Agreement. The Tribe will not unreasonably withhold or delay any licenses, permits, or other concurrences required by a Law enacted by it.

18.01.02 If, in the exercise of its sovereignty, the Tribe enacts any Law which it expects Shell, or anyone doing business with Shell, to comply with, the Commission will notify Shell in writing of such Law and provide Shell with a copy thereof. If Shell then believes or later determines that such a Law (a) may cause, or is causing, the Governmental Costs of mining Crow Coal to exceed Governmental Costs which would be associated with the mining of Montana Coal not covered by such Law, or (b) may preclude, or is precluding, Shell from mining Crow Coal covered by this Agreement which otherwise could be mined under State and Federal law, then Shell shall notify the Commission in writing of the basis for Shell's belief. Shell and a committee of the Commission shall thereafter meet within 30 days after the Commission's receipt of Shell's

notice to discuss the matter. If, after that meeting, Shell maintains its position and the Commission does not amend or modify the Law to remove Shell's objection, then either Party may at any time submit the matter to arbitration. Shell's compliance with a Law shall not constitute a waiver of its right to challenge such Law under this Article. It is not the purpose of this Article to waive Shell's obligation to comply with any lawful Law except to the extent provided herein.

18.02 Tribal Tax. On Coal Delivered pursuant to this Agreement, Shell will pay the Crow Tribe an amount equal to the Montana State severance tax existing at the time (currently 30 percent of sales price excluding taxes based on production) less whatever is required to be paid to the State of Montana.

18.03 Disputes as to Cost. The arbitrators shall be empowered to find whether the Law causes the Governmental Costs of mining Crow Coal to exceed costs which would be applicable if the mining were not covered by the Law, and to determine to what extent the Law so increases costs. Shell will not have to comply with any Law except to the extent compliance, as found by the arbitrators, will not increase the Governmental Costs of mining Crow Coal over costs which would be applicable if the Law did not apply. In determining whether the Law causes the Governmental Costs of mining Crow Coal to exceed what they would be if the mining were of Montana Coal, the arbitrators shall be guided in their decision by comparing the Governmental Costs applicable to Crow Coal with the Governmental Costs applicable to Montana Coal. Such costs shall be those applicable to all Mining Activities, and shall cover all costs, including but not limited to costs such as taxes, fees,

operating expenses, safety requirements and reclamation costs. In making their comparisons the arbitrators shall take into account all relevant factors they consider reasonable and necessary to permit a valid comparison of the Governmental Costs on disparate mining operations. In addition, the arbitrators may consider any savings or reduction in Governmental Costs of mining Crow Coal which have resulted from the passage of other Laws.

18.04 Disputes as to Reserves. In determining whether the Law precludes Shell from mining Crow Coal covered by this Agreement which otherwise could be mined under State and Federal law, the arbitrators shall compare the Law with the governmental restrictions imposed on the mining of Montana Coal which preclude the recovery of Coal reserves. If the arbitrators determine that the Law precludes Shell from mining Crow Coal which would not be precluded if it were Montana Coal, Shell will not be subject to the Law to the extent that it is more preclusive.

18.05 Jurisdictional Disputes. If Shell should in good faith question any Law on the basis that the Tribe does not have jurisdiction to pass such Law, Shell may refuse to comply with such Law until the Tribe obtains a ruling from an appropriate State of federal court to the effect that the Tribe does have such jurisdiction. If Shell is in good faith complying with a State law affecting its Mining Activities on the Reservation and the Tribe believes the State lacks jurisdiction to impose such law, Shell may comply with such law until the Tribe obtains a ruling from an appropriate State or federal court to the effect that the State lacks such jurisdiction.

Article 19 Use of Coal by Members of Tribe

Reasonable supplies of Coal will be made available at no charge at the mine for domestic use by Crow Indians. No royalty or Tribal taxes or fees will be due or payable by Shell for any Coal so used. Pickup of the Coal will be from a safe area and at times which do not unreasonably interfere with Mining Activities.

4/8/82

Fredericks & Pelcyger
ATTORNEYS AT LAW
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MEMORANDUM IN SUPPORT OF CROW TRIBE'S AUTHORITY TO IMPOSE A SEVERANCE TAX ON TRIBALLY OWNED COAL MINED FROM THE "CEDED AREA"

INTRODUCTION

The Crow Tribe of Indians enacted a 25% severance tax on January 31, 1976 that applies to all of the Tribe's coal resources, including the Tribe's coal in the so-called ceded strip. Following the Secretary of the Interior's review, the tax is now in effect for the coal within the reservation boundaries.

At the time the Tribe's tax was enacted, Article VI, §10 of the Tribe's Constitution provided that the Tribe, "shall have the power to levy, assess, and collect taxes and license fees upon *non-members of the Crow Tribe doing business within the boundaries of the Crow Indian Reservation.*" [Emphasis added.] Based on this geographical limitation in the Tribe's Constitution, the Tribe's severance tax has not been applied to coal mined by Westmoreland Resources under lease from the Crow Tribe from the area that is generally known as "the ceded strip." During the period from 1976 to the present, Westmoreland has been the only producer of Crow coal. It has paid the State of Montana approximately $35,000,000.00 in severance taxes. During this same period, Westmoreland paid the

Crow Tribe approximately $12,000,000.00 in royalties. If the Tribe's severance tax had been in effect during this period, the Tribe would have collected approximately $29,000,000.00 in additional revenues from Westmoreland.

In 1978, the Crow Tribe sued the State of Montana claiming that Montana's severance tax is invalid as applied to all tribally owned coal, both within the reservation and in the ceded strip. The suit was dismissed by the district court. *Crow Tribe v. Montana*, 469 F. Supp. 154 (D. Mont. 1979). The Tribe appealed and was supported by the United States as *amicus curiae*. In July, 1981, the Court of Appeals held that Montana's tax on Crow coal would be invalid if the Tribe proves at a subsequent trial that Montana's tax prevents the Tribe from receiving a large portion of the economic benefits of its coal, that the state's tax has the effect of regulating the Tribe's mineral resources, and that the state's tax substantially affects the Tribe's ability to provide governmental services. *Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981). The Court of Appeals expressly stated its belief that after a trial Montana's tax will ultimately be found invalid as applied to Crow owned coal in both the reservation and the ceded area. 650 F.2d at 1114. Significantly, the decision of the Court of Appeals regarding the validity of Montana's tax was not predicated on whether or not the Tribe had or has a comparable tax. *See*, 650 F.2d at 1115-16. Under the Ninth Circuit's decision, the validity of invalidity of Montana's tax will turn on other matters.

The Crow Tribe has adopted an amendment to its Constitution that authorizes the application of its severance tax to the Tribe's coal in the ceded strip, including

the coal now being mined by Westmoreland. The Interior Department is now considering whether to approve this amendment. It must be approved before the Tribe's tax on ceded strip coal can become effective.

Questions have been raised concerning the authority of the Crow Tribe to impose a severance tax on its coal in the ceded strip. The purpose of this Memorandum is to respond to those questions and to demonstrate that the Tribe does have the authority to tax the severance and production of that coal.

For purposes of this Memorandum, we assume the the ceded strip is no longer included in the Crow Reservation and that the Tribe lacks general jurisdiction over the surface lands in the ceded area. *See, Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1981).

* * *

V

APPROVAL OF THE AMENDMENT TO THE TRIBAL CONSTITUTION WHICH WOULD ENABLE THE TRIBE TO TAX ITS CEDED STRIP COAL WOULD FULFILL THE GOVERNMENT'S TRUST OBLIGATION

The government acts in a fiduciary capacity with respect to the Crow Tribe's property rights held in trust by the United States. *Mason v. United States*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97; *United States v. Michigan*, 653 F.2d 277, 278-79 (6th Cir. 1981), *cert. denied*, ___ U.S. ___; *Nance v. EPA*, 645 F.2d 701, 710-11 (9th Cir. 1981, *cert. denied*, ___ U.S. ___; *Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980).

Thus, in considering whether to approve the amendment to the Tribe's Constitution which would authorize the imposition of a severance tax on ceded strip coal, the Secretary of the Interior is required to act in a manner that will advance and protect the Tribe's best interests. While the Secretary is bound by all applicable legal constraints, he is *not* an impartial judge or decision-maker. He is rather the Tribe's advocate and protector. As recently stated by the Supreme Court's Special Master, "[T]he trustee's duty is not to decide what is *fair*, his duty is to present the *best* case for his Indian wards." E.P. Tuttle, Report of the Special Master, *Arizona v. California*, U.S. Sup. Ct. No. 8 original, 48-49 (February 22, 1982), emphasis in original.

There is no doubt that approval of the Tribe's constitutional amendment would advance and protect the Tribe's best interests. At the present time, the only Crow land that is being commercially mined is located in the ceded strip. Economic conditions on the reservation are severely depressed. Unemployment among tribal members is extremely high/[sic] the Tribe is impoverished as are most of its members. These conditions have been aggravated by recent substantial cutbacks of federal funds and programs.

Immediate imposition of the Tribe's severance tax on Westmoreland's coal operation will go a long way toward alleviating these conditions.* It is the single most pressing item on the Tribe's agenda. It will enable the Tribe to

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* The Tribe will take steps to insure that Westmoreland is not subject to the severance taxes of both Montana and the Tribe. Westmoreland obviously would not be able to compete with other coal operators if it were subjected to a double tax and

restore some vitally needed services and to plan and undertake economic development projects aimed at utilizing the Tribe's energy wealth which would in turn generate greater tribal revenues and provide enhanced employment opportunities for tribal members.

This Memorandum demonstrates that there is ample legal authority to support the Tribe's power to impose its severance tax on its ceded strip coal. There are certainly no statutory or other prohibitions on the Tribe's authority to impose that tax. The Tribe has a desperate need for the additional revenues that would be generated by its tax. Under these circumstances, the government's trust obligation to the Tribe mandates that the constitutional amendment be approved so that the Tribe can impose and implement its tax.

Westmoreland is free to protest the tax and challenge its legality in the courts.* Westmoreland does not require any additional protection. The Tribe's severance tax is

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it is in the Tirbe's interest to insure that Westmoreland continues and, if possible, expands its present production.

* Westmoreland has intervened in *Crow Tribe v. Montana*, *supra*, and has contested the validity of the Tribe's severance tax. Consequently, the remand of that case from the Ninth Circuit will provide a forum for the resolution of that issue if Westmoreland elects to pursue its claim. Indeed, if the amendment to the Tribe's Constitution is not approved by the Secretary, the Tribe's tax cannot become effective and there would not be any actual case or controversy between the Tribe and Westmoreland. Thus, secretarial aproval of the Tribe's constitutional amendment is a condition precedent to a judicial determination. The courts should be the ultimate decision-makers on this issue, not the Secretary.

only 25% of the value of its coal as compared to Montana's 30% rate. Moreover, under the Ninth Circuit's decision in *Crow Tribe v. Montana, supra,* 650 F.2d 1104, it is highly probable that Montana's severance tax will be held invalid as applied to all of the Tribe's coal resources. If the amendment to the Tribe's Constitution is not approved, the result will be to foreclose any severance tax on ceded strip coal. Such a void would result in a windfall for Westmoreland and its customers that cannot be justified.

The Secretary's duty is to fulfill his trust obligation and to assist the Tribe's effort to become economically self-sustaining. Approving the amendment to the Tribe's Constitution would fulfill that obligation.

FREDERICKS & PELCYGER

BY _____
Robert S. Pelcyger

AMENDMENT TO AMENDED COAL MINING LEASE
OF
INDIAN LANDS

THIS IS AN AMENDMENT to the amended coal mining lease of Indian lands entered into between the Crow Tribe of Indians of the Crow Reservation ("Lessor") and Westmoreland Resources, Inc. ("Lessee").

THE BACKGROUND of this Amendment is as follows:

A. On November 26, 1974, Lessor and Westmoreland Resources, a partnership, entered into an amended coal mining lease of Indian lands known as Tract III.

B. The amended lease made no provision relating to any taxes which the Lessor might impose upon the operations of Westmoreland Resources.

C. Westmoreland Resources was incorporated on June 29, 1978 and on that date Westmoreland Resources, Inc. ("Lessee") became entitled to all of the rights and obligations of Westmoreland Resources, a partnership, in the amended lease and the partnership and its partners were thereby released from all obligations and liabilities thereunder.

D. Lessor, Lessee, and the State of Montana have been involved in a dispute as to the extent to which the Lessor and the State of Montana have the power to tax Lessee's mining operations pursuant to the amended lease, and the Lessor and Lessee desire to resolve the dispute between them by this Amendment to the amended lease.

THE TERMS of this Amendment are as follows:

1. On coal mined and shipped from the leased premises pursuant to the amended lease, Lessee will from time to time pay to the Lessor a tax equal to the Montana state coal severance tax existing at that time and applicable to the mining of coal generally within the state (currently 30 percent of sales price excluding taxes based on production) and a tax equal to the Montana state gross proceeds tax existing at that time and applicable to the mining of coal generally within the state (currently the county mill levy applied to 45 percent of gross receipts from mining, excluding taxes based on production), less whatever amount is required to be paid in severance and gross proceeds taxes to the State of Montana or its political subdivisions. Compliance with the terms of this Amendment shall satisfy any obligation which Lessee may have now or at any time hereafter to pay any severance or other tax to Lessor pursuant to any tax ordinance which now exists or may be adopted by Lessor hereafter and Lessor shall not attempt to assess or collect any tax or other amount from Lessee except as provided for in the lease as amended.

Notwithstanding the provisions of this paragraph 1, the amount payable hereunder shall not exceed the amount that Lessee would be obliged to pay the Lessor under tax ordinances of general application to all persons situated as Lessee, enacted by Lessor and then in effect, in the absence of this Amendment.

2. Lessee shall provide to the Lessor all of the information that Lessee may be, or otherwise would be, required to provide to the State of Montana or its political

subdivisions in satisfaction of the requirements of Montana's severance tax law and gross proceeds tax law at the same time that such information is, or otherwise would be, provided to the State of Montana or to its political subdivisions. Lessee shall pay any amounts due to the Lessor under this Amendment, and provide an accounting of, and explanation for, said amounts, at the same time that Montana's severance and gross proceeds taxes are being, or otherwise would be, paid.

3. In the event that either the Montana state severance tax or gross proceeds tax should be repealed or reduced below its current level, then

(a) Lessor may require Lessee to negotiate with Lessor on the amount of severance and/or gross proceeds taxes, if any, which Lessee will pay to the Lessor by giving Lessee notice of an intent to renegotiate this provision with respect to a severance tax and/or gross proceeds tax within ninety (90) days (unless otherwise agreed) after the effective date of the act of the Montana legislature or after action of any Montana political subdivision effecting any such reduction.

(b) Unless otherwise agreed, negotiations shall commence within thirty (30) days after Lessee's receipt of the Lessor's notice of intent to renegotiate.

(c) Lessee's obligation to pay a severance and/or a gross proceeds tax to Lessor under this Amendment shall be suspended during the period of renegotiation from the last day of the month in which the intent to renegotiate is received by Lessor. If tax rates are established by agreement as a result of renegotiation, then Lessee shall pay Lessor a tax or taxes based on those rates

retroactive to the time of suspension of payment under this Amendment.

4. In the event the parties are unable to reach an agreement on the amount of taxes to be paid to the Lessor within sixty (60) days of the commencement of negotiations (excluding time required to seek approval of any such agreement at the next meeting of Lessor's Tribal Council), then, unless otherwise agreed

(a) Lessor and Lessee agree to seek a judicial resolution by declaratory judgment in the United States District Court for the District of Montana of whether the Lessor has the power to impose taxes on Lessee in the absence of Lessee's agreement, as if this Amendment to the lease never existed;

(b) Lessor hereby waives whatever defense of sovereign immunity it may have for purposes of securing such a judicial resolution.

5. This Amendment to the lease will not be construed in any way as an admission by Lessor that Lessor has no power to tax Lessee without Lessee's consent.

6. This Amendment to the lease will not be construed in any way as an admission by Lessee that Lessor has any power to impose any tax on Lessee without Lessee's consent.

7. The amount of tax payable to Lessor under paragraph 1 of this Amendment will not exceed the amount that otherwise would be payable to Montana or its political subdivisions, giving effect to all allowable deductions and credits.

8. This Amendment shall become effective on approval by the Assistant Secretary for Indian Affairs following the approval of this Amendment by the Crow Tribal Council as evidenced by the attached certificate.

Executed on this 10th day of June, 1982.

Attest:
/s/ Theodore Hogan
Secretary, Crow Tribal Council

Attest:

/s/ Richard G. Dauger
Secretary

Approved:

/s/ Wilfred G. Bowther
By the Assistant Secretary for Indian Affairs, United States Department of the Interior

CROW TRIBE OF THE CROW INDIAN RESERVATION

By: /s/ Donald R. Stewart
Donald Stewart, Chairman of the Crow Tribe of Indians

WESTMORELAND RESOURCES, INC.

By: /s/ C. Joseph Presley
C. Joseph Presley, President

Date: Sept. 29, 1982

State of Montana)
) ss.
County of Big Horn)

On this 10th day of June, 1982, before me, the undersigned, a Notary Public for the State of Montana, personally appeared Donald Stewart, known to me to be the Chairman of the Crow Tribe of Indians that executed the within instructment and acknowledged to me that such Tribe executed the same.

WITNESS my hand and seal the day and year first hereinabove written.

My commission expires: NOTARY PUBLIC for the State of Montana Residing at Billings, Montana My Commission Expires Sept. 9, 1984

Illegible
Notary Public
Address: Billings, Montana

State of Montana)
) ss.
County of Yellowstone)

On this illegible day of June, 1982, before me, the undersigned, a Notary Public for the State of Montana, personally appeared C. Joseph Presley, known to me to be the President of the corporation that executed the within instrument and acknowledged to me that such corporation executed the same.

WITNESS my hand and seal the day and year first hereinabove written.

My commission expires: July 9, 1982

/s/ Illegible
Notary Public
Address: Box 1883
Billings, MT 59103

Certificate

This Amendment was presented to the Crow Tribal Council at a duly called Council meeting held on July 10, 1992, and the Crow Tribal Council approved the Amendment by the attached resolution.

/s/ Donald R. Stewart
Donald Stewart,
Chairman of the
Crow Tribe of Indians

Dated: July 13, 1982 /s/ Ted Hogan
Ted Hogan,
Secretary of the
Crow Tribe of Indians

Robert S. Pelcyger
Thomas W. Fredericks
Thomas R. Acevedo
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Attorneys for Plaintiff
Crow Tribe of Indians

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, v. STATE OF MONTANA; ELLEN FEAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; YELLOWSTONE COUNTY, Montana; TREASURE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; MAY JENKINS, Treasurer, Yellowstone County, Montana; CARIBEL BONINE, Treasurer, Treasure County, Montana. Defendants, WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	No. CV-78-110-BLG THIRD AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION, RESTITUTION, TAX REFUNDS, MONEY DAMAGES, AND OTHER RELIEF.

Plaintiff, CROW TRIBE OF INDIANS, by their attorneys, bring this action against the above-named defendants and allege as follows:

JURISDICTION

1. This is a civil action for injunctive, declaratory, restitutionary, tax refunds, money damages, and other relief.

It arises under Article I, Section 8, Clause 3 of the Constitution of the United States; under the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1976); under the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123; under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; under Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 675; and under 42 U.S.C § 1983. This Court has jurisdiction under 28 U.S.C. §§ 1362 and 1343.

PARTIES

2. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by 14 the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

3. Defendant STATE OF MONTANA (hereinafter "State" or "Montana") is a sovereign State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

4. Defendant ELLEN FEAVER is Director of the Montana Department of Revenue. She is sued in her official

capacity; her official address is: Department of Revenue, Sam W. Mitchell Building, Rm. 455, Helena, Montana 59601.

5. Defendant BIG HORN COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Big Horn County.

6. Defendant YELLOWSTONE COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Yellowstone County.

7. Defendant TREASURE COUNTY, Montana, is a political subdivision of the State. Part of the Crow Tribe's reserved coal resources are encompassed within the exterior boundaries of Treasure County.

8. Defendant LORRAINE HAMILTON is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Box 8, Hardin, Montana 59034.

9. Defendant MAY JENKINS is Treasurer of Yellowstone County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Billings, Montana 59101.

10. Defendant CLARIBEL BONINE is Treasurer of Treasure County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Box 429, Hysham, Montana, 59038.

11. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying the Crow Reservation and an area known as the "ceded area" that was opened to allotment and settlement by non-Indians pursuant to the Act of April 17, 1904, 33 Stat. 352. In all, the plaintiff Tribe is the beneficial owner of approximately six billion tons of coal within the State. Smaller amounts of coal underlying the Crow Reservation are owned by persons or entities other than the Tribe. The United States manages and supervises the Tribe's trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

12. Since 1967, pursuant to the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968 82 Stat. 123, the United States Secretary of the Interior and the Commissioner of the BIA (now the Assistant Secretary of the Interior for Indian Affairs) have actively recommended, encouraged, advised, and approved transactions involving the development of Crow coal resources.

13. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale of prospecting permits covering Crow coal underlying 34,671 acres in the ceded area. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. One of the leases, which

encompassed approximately 16,130 acres, was subsequently terminated by mutual consent of the Tribe and Westmoreland with the approval of the Department of the Interior. Westmoreland is the only lessee currently mining Crow coal. The existing lease was amended by agreement dated July 10, 1982 which was approved by the BIA on September 29, 1982.

14. On May 8, 1980, the Tribe entered into a lease with the Shell Oil Company embracing Crow coal underlying approximately 2,560 acres within the Crow Indian Reservation. This agreement also includes various options for mining Crow coal underlying additional acreage within the Crow Reservation. The agreement and lease will become effective when approved by the Secretary of the Interior or his authorized representative.

15. The Tribe is currently negotiating with several other companies who have expressed considerable interest in entering into leases, joint ventures, or other mining agreements with the Crow Tribe for the development and production of Crow coal.

16. In 1975, the State enacted statutes which imposed on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal produced in the State. Montana Code Annotated §§ 15-35-101 through 15-35-111, 15-23-701 through 15-23-704.

17. Defendants Feaver, Hamilton, Jenkins, and Bonine are the state and county officials charged by Montana law with the enforcement and collection of the Montana coal severance and gross proceeds taxes.

18. Most of the Crow coal is, or will be, mined from the surface and is, or will be, taxed at the rate of 30% of the contract sales price pursuant to the State's severance tax statute. Since 1978 and 1976, Westmoreland has paid more than $54,000,000 in state severance taxes and approximately $7,000,000 in gross proceeds taxes on the production and sale of the coal under lease from the Crow Tribe. During this same period, Westmoreland has paid the Crow Tribe approximately $15,000,000 in royalties pursuant to its lease.

19. There are approximately 6,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Reservation. The Crow people retain a significant degree of tribal culture, maintaining the Crow language and Crow tribal ceremonies and customs. To date, the Crow people have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status. The development of tribal coal offers an unprecedented opportunity for the Crow people to improve their economic situation.

20. The Crow Tribe and its members are severely impoverished. The Tribe is deeply in debt; it does not have sufficient revenues to provide adequate services; and the unemployment rate among tribal members is extremely high, much higher than among the non-Indian populations of Montana and adjacent states.

21. The Crow Tribe's existing coal mining leases with Westmoreland and Shell include provisions which

require the lessees to pay the Tribe amounts equal to Montana's taxes less whatever the lessees are required to pay to the State.

22. The imposition, assessment and collection of the 30% state severance tax and the gross proceeds tax have imposed a direct and severe burden upon the plaintiff Tribe in that the taxes are a direct and major cost associated with the production of Crow coal.

23. The natural and immediate consequences of the imposition, assessment, and collection of these taxes have been: (i) drastically increased costs to purchasers of Crow coal; (ii) a correspondingly severe restriction upon the amount of royalty payments which Westmoreland and others have been willing to pay to the plaintiff Tribe under their leases; and (iii) the frustration of efforts by the Tribe to renegotiate its leases with Westmoreland and others. The state severance and gross proceeds taxes have adversely affected the competitive status of Crow coal and, when taken in conjunction with the Crow tribal tax, may increase the cost of Crow coal so drastically as to render that coal noncompetitive in the marketplace and thereby threaten to preclude further Crow coal development.

24. The existence of the 30% state severance tax and the gross proceeds tax has frustrated efforts by the Tribe to negotiate or renegotiate leases with the other permittees and lessees of Crow coal and has severely depressed the amount of royalties which those permittees and lessees are willing and able to pay to the Tribe under any such leases or pursuant to other arrangements.

25. The existence of the 30% state severance tax and the gross proceeds tax and the gross proceeds tax [sic] has also frustrated efforts by the Tribe to offer permits and leases covering additional coal deposits in the ceded area and elsewhere on the reservation. It has also rendered the Tribe incapable of entering into any fair arrangements for the development of tribal coal or of developing its own coal pursuant to mining contracts with persons capable of performing the actual mining of such coal.

26. Prior to and since the enactment of the challenged and tax laws, Crow tribal representatives, by correspondence by testimony before the Montana legislature, have consistently protested the imposition of these unlawful taxes upon Crow coal, to no avail.

27. Plaintiffs are without recourse to any remedies other than those sought by this Complaint and, unless such relief is granted, they will continue to suffer immediate and irreparable injury.

28. An actual controversy has arisen and now exists between the plaintiff and the defendants as to the validity of the State's severance and gross proceeds taxes as applied to Crow owned coal and to coal underlying the Crow Indian Reservation.

FIRST CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 28.

29. The Constitution of the United States, Article I, Section 8, Clause 3, grants to the Congress of the United

States exclusive authority over commerce with Indian tribes. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal under lying the Crow Indian Reservation have not been authorized by Congress. These Montana taxes therefore constitute an unlawful and unconstitutional interference with Congress' exclusive authority over Indian commerce.

SECOND CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 29.

30. Montana's severance and gross proceeds taxes on all of the sale and production of Crow owned coal and on coal underlying the Crow Indian Reservation are inconsistent with, and under the Supremacy Clause of the United States Constitution, are preempted by, the Indian Mineral Leasing Act of 1938, and its implementing regulations, 25 C.F.R. §§ 171.1-171.30, 173.1-173.29 insofar as those taxes: (i) deprive the Crow Tribe of its authority and control over its mineral resources; (ii) severely discourage the economic development of the Crow Reservation; (iii) deprive the Crow Tribe of a very large portion of the economic benefits of its coal; (iv) diminish substantially the power of the Crow Tribe to regulate the development of its mineral resources; or (v) appropriate to the State a significant portion of the value of the Tribe's coal resources that has no relationship to the services, if any, related to the development of that resource provided by the State and its political subdivisions.

THIRD CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 30.

31. Montana's 30% severance tax is invalid on its face as applied to all Crow owned coal and to all the coal underlying the Crow Indian Reservation because: (i) the purpose of the tax is to appropriate most of the economic rent attributable to the production of such coal; (ii) the magnitude of the tax is enormous in and of itself and is significantly greater than comparable taxes imposed by other states; and (iii) 50% of the proceeds of the tax are paid into a trust fund which can be used for any governmental purpose, is not tied in any way to State costs or services attributable to the mining and production of such coal, and has the effect of appropriating the Crow Tribe's mineral wealth for the benefit of the State.

FOURTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 31.

32. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal underlying the Crow Indian Reservation have:

(i) illegally subjected the property of the sovereign Crow Tribe and the property subject to the Tribe's jurisdiction to an unauthorized state tax;

(ii) illegally reduced the ability of the sovereign Crow Tribe and its members to realize full benefit, use and development of their land, thereby depriving them of

liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and of the federally protected and guaranteed rights of the Tribe and its members;

(iii) illegally threatened and interfered with the ability of the sovereign Crow Tribe to exercise its sovereignty through tribal taxes;

(iv) illegally and severely infringed upon the right and ability of the sovereign Crow Tribe to govern itself and its people;

(v) illegally and severely impaired the ability of the Crow Tribe to serve its people through its various tribal programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program, and its reservation maintenance services; and

(vi) illegally and severely impaired the ability of the sovereign Crow Tribe to engage in various economic development activities aimed at producing vitally needed jobs for tribal members and reservation residents and income for the Tribe and its members.

33. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal underlying the Crow Indian Reservation infringe on and interfere with the rights of the Crow Indians to make their own laws and be ruled by them.

FIFTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 33.

34. On January 31, 1976, the plaintiff Tribe enacted its own tribal coal taxation code, which imposes upon persons mining Crow coal a severance tax of 25% of the value of Crow coal mined by such persons. On January 17, 1977, the Secretary of the Interior approved the Crow taxation code to the extent that it applied to coal underlying the Crow Reservation proper, but disapproved the tax to the extent that it applied to the Crow Tribe's coal in the ceded strip. The Crow Tribe has also enacted a gross proceeds tax on the sale of Crow coal.

35. On July 10, 1982, the Crow Tribe and Westmoreland agreed to an amendment to their coal mining lease under which Westmoreland recognized the right of the Crow Tribe to levy and collect severance and gross proceeds taxes on the production and sale of Crow owned coal in the ceded strip. That amendment was approved by the Bureau of Indian Affairs on September 29, 1982.

36. The Crow tribal severance and gross proceeds taxes, enacted and agreed to in exercise of the Tribe's sovereignty and approved by the Secretary of the Interior pursuant to congressionally delegated authority in the implementation of federal policy, preempts state taxation of the subject coal.

SIXTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 36.

37. Montana's severance and gross proceeds taxes on the sale and production of Crow coal and on all of the coal underlying the Crow Indian Reservation is unconstitutional because it constitutes a multiple and impermissible burden on interstate commerce in violation of the Interstate Commerce Clause of the Constitution, Article I, Section 8, Clause 3.

SEVENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 37.

38. Defendants are required to give all producers and sellers of Crow coal and of all coal underlying the Crow Indian Reservation a credit against Montana's severance and gross proceeds taxes for the full amount of any and all severance and gross proceeds taxes paid by such producers and sellers to the Crow Tribe.

EIGHTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 38.

39. The State's severance and gross proceeds taxes constitute unlawful taxes on the property of the Crow Tribe held in trust by the United States insofar as the State's taxes are based in part on the value of the Crow Tribe's royalty interest.

NINTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 39.

40. All of the severance and gross proceeds taxes collected by the State of Montana from Westmoreland based on the sale and production of coal mined pursuant to the lease between Westmoreland and the Crow Tribe have been illegal and unconstitutional.

41. Montana's severance and gross proceeds taxes as applied to Crow owned coal and to coal underlying the Crow Indian Reservation are now illegal and have been illegal since collections began in 1975 and 1976 respectively. The effect of these taxes has been to deprive the Crow Tribe of its rights under federal law, to diminish substantially the value of the Crow Tribe's coal resources, and to impinge and interfere with the Tribe's sovereign right to govern its reservation.

42. The Crow Tribe is entitled to a refund of all severance and gross proceeds taxes that have been paid to the defendants on the production and sale of Crow owned coal and of coal underlying the Crow Indian Reservation.

TENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 42.

43. Defendants have been unjustly enriched and have wrongly profitted [sic] from the collection of severance and gross proceeds taxes on the production and sale of Crow owned coal and coal underlying the Crow Indian

Reservation. The plaintiff Crow Tribe of Indians is entitled to restitution of those illegally collected funds in order to restore to the plaintiff and to take away from the defendants the benefits and monies that rightly belong to the plaintiff.

ELEVENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 43.

44. The existence of Montana's severance and gross proceeds taxes on Crow owned coal and on the coal underlying the Crow Indian Reservation has stifled and caused severe reductions in the amount of such coal that otherwise would have been mined, produced and sold. The plaintiff Crow Tribe has been and continues to be severely damaged by such reductions.

TWELFTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 44.

45. It is unfair, unconscionable and inequitable for the defendants to hold, benefit from and utilize the revenues collected from severance and gross proceeds taxes that have been imposed on the production and sale of Crow owned coal and on coal underlying the Crow Indian Reservation. It is necessary to impose a constructive trust on such funds for the benefit of the plaintiff Crow Tribe of Indians in order to prevent unjust enrichment to the defendants.

THIRTEENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 45.

46. Plaintiff is and has been the beneficial owner of the sums of money that have been paid to the defendants in the form of severance and gross proceeds taxes on the production and sale of Crow owned coal and of coal underlying the Crow Indian Reservation. The defendants have wrongfully converted these sums of money. The defendants are liable to the plaintiff for the value of such wrongfully converted property.

FOURTEENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 46.

47. By reason of the allegations set forth in this complaint, plaintiff is entitled to additional sums as punitive or exemplary damages from the State.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief:

1. A judgment declaring that the Montana Coal Severance Tax, M.C.A. §§ 15-35-101 to 15-35-111, and the Montana Gross Proceeds Tax, M.C.A. §§ 15-23-701 to 15-23-704 are invalid and have been preempted by federal law as applied to all coal that is held by the United States in trust for the Crow Tribe of Indians and to all coal underlying the Crow Indian Reservation;

2. A judgment enjoining the defendants from imposing, collecting, and enforcing the Montana Coal Severance Tax and the Montana Gross Proceeds Tax on all coal that is held by the United States in trust for the Crow Tribe of Indians and to all coal underlying the Crow Indian Reservation;

3. A judgment ordering the defendants to give all producers and sellers of Crow coal and of all coal underlying the Crow Indian Reservation a credit against Montana's severance and gross proceeds taxes for the full amount of any and all severance and gross proceeds taxes paid to the Crow Tribe of Indians.

3. [sic] A judgment awarding the Crow Tribe of Indians all severance and gross proceeds taxes that have been paid to the defendants based on the production or sale of all coal held by the United States in trust for the Crow Tribe of Indians and all coal underlying the Crow Indian Reservation;

5. A judgment declaring that all tax revenues that have been collected by the defendants based on the production and sale of Crow coal and all coal underlying the Crow Indian Reservation are held by the defendants in constructive trust for the sole use and benefit of the Crow Tribe of Indians and ordering the defendants to utilize, invest, dispose of, and expend all such funds for the sole use and benefit of the Crow Tribe of Indians.

6. A judgment awarding the Crow Tribe of Indians punitive or exemplary damages in an amount to be determine by the Court.

7. A judgment awarding the Crow Tribe of Indians cost of suit, expert witness fees, and attorneys' fees.

8. For such additional relief as the Court may deem just and proper.

DATED: November 19, 1982.

Respectfully submitted,

Robert S. Pelcyger
Tom W. Echohawk
FREDERICKS & PELCYGER
Francis X. Lamebull
LAMEBULL LAW FIRM

By: /s/ Robert S. Pelcyger
Robert S. Pelcyger

Attorneys for Plaintiff
Crow Tribe of Indians

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I, Donald W. Stewart, Sr., being first duly sworn, deposes and says:

1. I am the Chairman of the Crow Tribe of Indians.

2. I have read the Third Amended Complaint of the Crow Tribe of Indians in the case of Crow Tribe v. Montana, Civil No. 78-110-BLG, in the United States District Court for the District of Montana, Billings Division. The

statements made in the Third Amended Complaint are true and are based on my own knowledge, information, and belief.

/s/ Donald A. Stewart, Sr.
Donald A. Stewart, Sr.

SUBSCRIBED AND SWORN TO before me this 16th day of November, 1982, by Donald A. Stewart, Sr.

/s/ Diane Illegible
Notary Public

My Commission Expires
March 11, 1986
1007 Pearl St. #240
Boulder, Colorado 80302

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NO. CV-78-110-BLG

THE CROW TRIBE OF INDIANS, et al., Plaintiffs, vs. THE STATE OF MONTANA, et al., Defendants.	MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO DEPOSIT FUNDS, and MOTION FOR PRELIMINARY INJUNCTION

STATEMENT OF FACTS

I.

To put in perspective the Crow Tribe's motion for preliminary injunction, and the Tribe and Westmoreland's motion to deposit funds into Court, it would be helpful to first briefly review some facts in this case.

In 1972 Westmoreland Resources, Inc. (hereinafter Westmoreland) entered into an agreement for coal mining

leases with the Crow Tribe of Indians (hereinafter the "Tribe"), covering about 31,000 acres of the so called "Ceded Strip", an area North of the Present Crow Indian Reservation. That 1972 agreement between the Tribe and Westmoreland did not include any provision for a Tribal severance tax on Westmoreland.

In 1975 the State of Montana (hereafter "State") enacted its present Coal Severance Tax, which tax is imposed on coal mine operators, including Westmoreland, who produced coal in Montana, and which tax was upheld by the United States Supreme Court. *Commonwealth Edison v. Montana*, 453 U.S. 609, 101 S. Ct 2946, 69 L Ed 2d, 884 (1981).

In January 1976 the Tribe enacted its own coal severance tax; however, at present there is no evidence in the record here that the Tribe's severance tax with regard to the "Ceded Strip" has been approved by the U.S. Secretary of the Interior.

In July 1978 the Tribe sought injunctive and declaratory relief challenging the Montana Severance Tax. Westmoreland moved to intervene and filed a counterclaim against the Tribe challenging the Tribe's right to tax Westmoreland and a crossclaim against the State, which claims are still pending.

In April 1979 this Court dismissed the Tribe's complaint pursuant to F.R. Civ. P. 12(b)6 for failure to state a claim. *Crow Tribe v. State of Montana*, 469 F. Supp 154.

In July 1981 the 9th Circuit Court of Appeals reversed and remanded for proceedings consistent with the Court's opinion, finding that the allegations of the

Tribe which sought declaratory and injunctive relief stated a cause of action. *Crow Tribe v. State of Montana*, 650 F.2d 1104, Cert denied ___ U.S. ___, 102 S. Ct. 2926 73 L Ed2d 1327, (1982).

On October 13, 1982, the Tribe and Westmoreland filed a Motion for leave to deposit Westmoreland's Montana Severance Taxes with the Court. On October 21, 1982, this Court issued an Order denying the motion for leave to deposit funds, finding, based on arguments of counsel, that the Tribe and Westmoreland had made no showing of certain harm if funds were not deposited but noted that the motion could be renewed.

On November 17, 1982 this Court issued an Order stating that the Tribe has 45 days from such Order to file and serve its third amended complaint, and that the Defendants shall have 30 days after service of said third amended complaint to file an answer.

On November 19, 1982, the Tribe filed a Motion for leave to file an amended complaint and filed and served a third amended complaint. The Defendants intend to answer the third Amended Complaint on or before December 20, 1982, and will deny many of the allegations therein.

On November 19, 1982 the Tribe and Westmoreland filed a motion pursuant to F.R. Civ. P. 67 to deposit funds with the Court; concurrently the Tribe filed a motion for preliminary injunction pursuant to F.R. Civ. P. 65 to enjoin the State from taking any action to enforce or collect its severance taxes from Westmoreland or penalizing Westmoreland for nonpayment of the tax to the extent the tax is imposed on coal held in trust for the Tribe. The record

does not contain any evidence as to actual ownership of the coal or what portion, if any, of the coal lands leased by Westmoreland fall within the category of that held in trust by the United States for the benefit of the Tribe.

There is little, if any factual evidence in the record of this case to support the Tribe's allegations in its original or amended complaints, or present motions before the Court filed on November 19, 1982, because there has been no discovery completed and no evidentiary hearings.

II.

ARGUMENT

A. INTRODUCTION:

It is important, for the purposes of the Court's ruling on the Tribe's request for a preliminary injunction and for deposit of the funds, that the Court distinguish between facts actually of record and those which are described by counsel for the Tribe but which are not actually of record before this Court.

Thus in proceeding to rule on the Pending Motion for the requested Preliminary Injunction the Court must weigh the actual showing made by the Tribe, that is in the way of actual facts of record, against the requirements that must be met by any applicant for preliminary injunctive relief. An applicant for such relief, in this case the Tribe, has the burden of showing that it meets certain tests, described later in Part E of this Memorandum, particularly pages 27 through 33. The Rule 67 Motion requests deposit of the funds in an account which effectively prevents the State from having the use and benefit

of the funds for the public purposes enumerated by §15-35-108 M.C.A. If that Motion is granted by this Court the ultimate effect upon the State, the public and even the Tribe is that the funds are not available for their intended public purposes, because the funds cannot be spent for such public purposes if they are deposited in escrow and thus a Rule 67 deposit has the same effect as an injunction.

The effect of the relief requested by the Tribe's motion for preliminary injunction and Westmoreland and the Tribe's motion to deposit funds, is to interfere with the normal operation, collection, enforcement, and disbursement of the Montana coal severance tax.

There are several reasons why this Court should deny the Tribe's motion for preliminary injunction, and the Tribe's and Westmoreland's motion to deposit funds. The Court could simply deny such relief upon the basis that the Tribe and Westmoreland have not met their burden of showing that they are entitled to a preliminary injunction or similar relief, but there are other threshold basis for denying relief. For purposes of organization and discussion this Memorandum presents the reasons and basis for denying the requested relief in the following order:

1. That 28 U.S.C. §1341, which generally prohibits Federal Courts from enjoining, suspending or restraining State's collection and disbursements of taxes, bars this Court from granting Westmoreland or the Tribe any relief which would enjoin, suspend, or

restrain Westmoreland's payment of Montana's Severance Tax or disposement thereof; and

2. That the Tribe does not have standing to seek a preliminary injunction in this case; and

3. That F.R. Civ. P. Rule 67, which provides for deposit of an undisputed sum of money, is not an appropriate remedy in this case; and

4. Finally, that the Tribe and Westmoreland have simply not met their evidentiary burden of proof considering the evidence in the record in this case, and have not met the normal criteria for a preliminary injunction, or similar relief.

These basis and reasons for denying the relief sought by the Tribe and Westmoreland are discussed more fully below, and can be viewed as a series of increasingly difficult hurdles which the moving parties must but can not overcome, in order to be entitled to the relief they seek.

B. THE TAX INJUNCTION ACT:

1. General prohibition against interference with State taxes.

The Tax Injunction Act, 28 U.S.C. §1341 provides:

> "District courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plan, speedy, and efficient remedy may be had in the Courts of such State."

The plain statutory language of the Tax Injunction Act prohibits Federal District Courts in nearly all circumstances from interfering with the collection and disbursement of State taxes. Congress created the bar to federal court jurisdiction to enjoin State taxes in 1937. Since that time, the Courts have consistently recognized and upheld the bar as an expression of strong public policy of federal non-interference with State taxation schemes, *Mandel v. Hutchinson*, 336 F.Supp. 772 (1971), aff'd., 494 F.2d 364, 366 (9th Cir. 1974), and as a "broad jurisdictional impediment to federal court interference." *Dillon v. Montana*, 634 F.2d 463, 466 (9th Cir. 1980). This jurisdictional impediment cannot be avoided by basing a taxpayer's complaint upon alleged violations of 42 U.S.C. §1983, 28 U.S.C. §1343, or the Federal Constitution. *See, e.g., Lynch v. Household Finance*, 405 U.S. 538, 542-3, n 6 (1972); *Kelly v. Springett*, 527 F.2d 1090, 1094 (9th Cir. 1975); *Mandel v. Hutchinson, supra*, 494 F.2d page 366; *Hickman v. Wujick*, 488 F.2d 875 (2d Cir. 1973); *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966).

2. A deposit of funds has the same effect as an injunction.

As a practical matter, the relief sought by the Tribe and Westmoreland, pursuant to Rule 67 to deposit funds, has the same effect as an injunction and falls within the §1341 prohibition not to " . . . enjoin, suspend or restrain", the assessment or collection of a state's taxes. For example, courts have pointed out that where a declaratory judgment would operate to suspend the collection

of a tax and afford about the same relief as granting an injunction, then declaratory as well as injunctive relief is precluded by §1341, particularly where the party has other adequate remedies. *Department of Employment v. United States*, 385 U.S. 355, 17 L Ed, 1054 (1966). As Justice O'Conner stated in a recent case:

> "Initialled [sic], we observe that the Act (i.e. 28 U.S.C. 1341) not only divests the district court of jurisdiction to issue an injunction enjoining state officials, but also of jurisdiction to take actions that "suspend or restrain" the assessment and collection of state taxes. Because the declaratory judgment "procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *Great Lakes Dredge & Dock v. Huffman*, 319 U.S. 293, 87 L Ed 1407, 63 S.Ct. 1070 (1943), the very language of the Act suggests that a federal court is prohibited from issuing declaratory relief in state tax cases. Additionally, because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of *anticipatory* relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act: "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of Taxes,". *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522, 67 L Ed 2d 464, 101 S Ct., 221 (1981).

California v. Grace Brethern Church, 102 U.S. 2508, 73 L Ed 2d 93, 102 S Ct. ___.

3. Westmoreland is barred relief by §1341.

Clearly Westmoreland is barred, under 28 U.S.C. §1341, from seeking injunctive relief, or relief which would "suspend or restrain", the collection of taxes, including as noted above, a deposit of taxes in escrow under Rule 67. Westmoreland, the taxpayer, and as such the real party in interest for purposes of injunctive relief, has a plain, speedy and efficient remedy available in the Montana State Courts. Montana statutes permit Westmoreland to pay the taxes under protest and sue in State Court to recover them, Section 15-1-402, M.C.A., or to seek declaratory judgment that the taxes are invalid, Section 15-1-406, M.C.A.

The coal severance tax being challenged here is the same tax recently challenged but upheld by the United States Supreme Court in *Commonwealth Edison v. Montana*, 453 U.S. 609, 101 S. Ct 2946, 69 L.Ed 2d 884 (1981). Westmoreland was among the utilities making the unsuccessful challenge. During the pendency of that case, Westmoreland did pay the severance tax under protest and sue in the Montana state courts to recover the tax. Since the decision of the U. S. Supreme Court in July, 1981, Westmoreland has not used its state remedies to challenge the Montana's Severance Tax here involved. Moreover, Westmoreland does not argue in this proceeding that those state remedies are somehow inadequate.

4. The Tribe does not qualify under the exception to §1341.

The Tribe, in its Memorandum, argues that 28 U.S.C. §1341 does not bar this Court's jurisdiction to grant the injunctive relief sought here by the Tribe because of a limited exception to §1341 for suits brought by Indian Tribes, relying on 28 U.S.C. §1362 and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634. Section 1362 provides:

> "The District Court shall have original jurisdiction of all civil actions, brought by an Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

The *Moe* case can be distinguished from the present case. In *Moe*, the state was applying its cigarette tax and personal property tax to Tribe members residing on the reservation. The Montana Severance Tax in this case is not imposed upon the Indians themselves, or upon mining activity on the reservation itself, nor upon any mining activity conducted by the Tribe.

In *Moe*, the United States Supreme Court held that the District Court had properly exercised jurisdiction over the claims of the Salashi and Kootenae Tribes' claims for relief in that case, as Section 1362 provided properly recognized Tribes with access to Federal Courts that "would be at least in some respects as broad as that of the United States suing as the Tribe's trustee." 425 U.S. at 473. The Court did not consider it necessary to decide whether the District Court had jurisdiction over plaintiffs

other than the Tribes in *Moe* and declined therefore, to make a decision on that question. 425 U.S. at 474-475, n 14. However, there is simply no authority permitting entities other than Indian Tribes to use §1362 in order to avoid the jurisdictional bar of §1341. Nor is there any authority permitting Indian Tribes to stake claims on behalf of intervenor defendants so that §1341 can be avoided.

(a) There is no factual evidence in the record to show that the Tribe has a monetary stake or litigious interest under Section 1362 in this case.

In its Memorandum in support of its motion for preliminary injunction, page 11, the Tribe alleges that it now has a direct monetary stake in this case, and an interest in protecting tribal government against state interference, which allows it to invoke federal jurisdiction. The tax here in question is paid by Westmoreland, not the Tribe. It is acknowledged that the Tribe and Westmoreland have entered into an amendment to their coal lease in 1982, but this can only create a fictional argument that the Tribe takes on the attributes of a taxpayer, or has a direct monetary stake in this litigation at this time. The Tribe bases its allegations of a monetary stake or litigious interest in seeking injunctive relief or a deposit primarily on the decision of the 9th Circuit in this case. However, as we shall develop more fully below, the decision of the 9th Circuit in this case, may have been

premised on erronous assumptions because there is question, and certainly lack of evidence in the record[1] before this Court, (1) as to whether the coal in the "Ceded Strip" and coal here in question, is the property of the Tribe, or held in trust for the Tribe, before it was leased, and (2) whether the Tribe's severance tax has been approved by the Secretary of the Interior, and would therefore be applicable to on and prior to January 31, 1983 to some but undocumented extent to the "Ceded Strip", and Westmoreland, even if the Montana Severance Tax did not exist. Therefore there is no evidence in the record that the Tribe is entitled to a refund of all, or a portion of the Montana Severance Tax paid to date or which will be paid on January 31, 1983. And the 9th Circuit noted that the Tribe is not entitled to a refund. *Crow Tribe v. State of Montana*, 650 F.2d 1104, n 13.

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[1] On page 2 of the Tribe's Memorandum in support of its motion for preliminary injunction it states – "the underlying minerals are held in trust for the Tribe and are subject to being leased pursuant to the 1938 Indian Mineral Leasing Act." The Tribe cites, *Cady v. Morton*, 527 P.2d 786, 789 (9th Cir. 1975); and this case, *Crow Tribe of Indians v. State of Montana*, 650 P.2d [sic] 1104, 1107 1114 n 16 (9th Cir. 1981) as basis for such ownership. However, in neither of these cases, was there any factual evidence or judicial determination of ownership of the coal but rather the Court's opinions were based on allegations and assumptions that the coal is held in trust for the Tribe. As we shall show, there is reason to believe at least a sizeable portion of the coal in the ceded strip does not belong and is not held in trust for the Tribe (see affidavit and paper, "Mineral Ownership on the Crow Ceded Strip January 1982", of Robert Snively).

(b) <u>The decision of the 9th Circuit is not conclusive evidence that the Montana Severance Tax violates any statute or the Tribe's rights or interests.</u>

Even if the assumptions of the 9th Circuit decision are correct that the Tribe owns the coal here involved, and even if the Tribe's tax is applicable, uncontested and certain as to amount, of the coal here involved, the Tribe misapprehends and quotes the decision of the 9th Circuit out of context. Basically, what the 9th Circuit's decision in this case did was hold that the allegations of the Tribe for injunctive and declaratory relief stated a cause of action, for declaratory relief, and contemplated the development of a record before this Court. The Court reversed and remanded for additional findings. For example, the 9th Circuit stated:

> "The Tribe has alleged facts that, *if proved*, would establish that the taxes are preempted . . . " (Emphasis added) (*Crow Tribe* p. 1107)

and for example the Court stated:

> "*If* the allegations of the complaint are sustained at trial, the Montana Coal Severance Tax will conflict . . . " (Emphasis added) (*Crow Tribe*, p. 1113)

Or as stated by the Court, the Tribe:

> "*To support its claim at trial*, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate tribal resources, and that the balance of state and tribal interests renders the state's

assertion of taxing authority unreasonable." (Emphasis added) (*Crow Tribe*, p. 1117)

Obviously, the record on many of the issues framed by the 9th Circuit, is yet to be developed in this case. And, while the Tribe quotes certain statements of the 9th Circuit which they argue support their allegations, there are also numerous quotes from the 9th Circuit decision, which support the position of the state, and the position that the Montana Severance Tax does not violate any Federal statutes or rights of the Tribe. For example, the Court stated:

> " . . . legitimate interest of the State must be considered, and the ultimate result . . . depends on "a particularized inquiry into the nature of the State, Federal, and Tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of State authority would violate Federal Law." *White Mountain Apache Tribe v. Bracher*, 448 U.S. at 149, 100 S. Ct. at 250. (*Crow Tribe v. Montana*, p. 1109).
>
> Some economic impact on Indian Tribes can be justified if state interests in imposing tax on coal from the Indian lands are legitimate. (*Crow Tribe v. Montana*, p. 1113).
>
> . . . the reviewing court must balance the importance of the state interest in asserting the particular authority against the impact of the Tribe's ability to govern itself effectively. *Fort Mojave Tribe v. County of San Bernardino*, 543 Fed. 1253, (9th Cir. 1976). (*Crow Tribe v. Montana*, p. 1115).

The 9th Circuit decision left many factual determinations unresolved. There is little if any other evidence in the record in this case by which the Tribe has established

that it has a direct or litigable interest under Section [sic] 28 U.S.C. §1362, which would be the basis for an exception to 28 U.S.C. §1341, particularly for anticipatory injunctive relief.

The exception allowing district court jurisdiction of cases brought by Indian Tribes involving state taxes is a narrow exception to §1341 bar of jurisdiction. *Dillon v. Montana*, 634 F.2d 466, 469 (Cir. Ct 1981); *Navaho Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228, 1233-34 (9th Cir. 1979). Therefore, the Tribe should be barred under §1341 from seeking injunctive relief in this case. Clearly, Westmoreland is barred by Section 1341, and the Tribe should not be allowed to stretch the Indian jurisdiction exception under Section 1362 for purposes of seeking injunctive relief until a record is developed in this case which demonstrates that the Tribe does in fact have an interest in the funds sought here to be enjoined or deposited.

C. STANDING:

Even if the Tribe can clear a first hurdle, and show that this Court has jurisdiction despite the prohibitions of 28 U.S.C. §1341, the Tribe can not clear a second hurdle, showing that it has standing at this time to seek injunctive relief or deposit of Westmoreland's Montana Severance Tax.

1. Standing generally.

In essence the question of standing is whether the litigant is entitled to have the Court decide the merits of a

particular issue, in this case the Tribe's requests for a preliminary injunction and deposit of funds. Standing is founded on concern about the proper, and properly limited role of the courts. Standing to sue is a constitutional limitation on federal court jurisdiction, but there are also prudential limitations of the exercise of federal jurisdiction concerning whether the interests sought to be protected are within the zone of interest to be protected. In order to have standing a plaintiff must always have suffered a distinct and culpable injury to himself that is likely to be redressed if the requested relief given is granted. In other words, the plaintiff must show actual or threatened injury of some kind to establish standing. Fed. Proc., L Ed Section 59:4. Standing to litigate exists where there is actual injury, redressable by the Court which can be traced to challenged action. *Valley Forge Christian College v. Americans United For Separation Of Church and State, Inc.*, ___ U.S. ___, 102 S.Ct. 758. Only if these requirements are met does the Federal Court have jurisdiction under Article III "Case or Controversy" requirement of the U.S. Constitution. Ordinarily, a party has no standing to assert the rights of third persons. The plaintiff must allege that he is the proper party to invoke the court's jurisdiction. The needed facts for the plaintiff's standing must adequately appear from the record or the motion must be dismissed. *Warth v. Seldin*, (1975) 422 U.S. 490, 45 L.Ed2d 343, 95 S.Ct. 2197.

2. <u>The Tribe has no proven direct injury for purpose of standing.</u>

The Tribe alleges in its memorandum in support of its motion for preliminary injunction, that the Tribe has a direct monetary stake in Westmoreland's current coal severance tax payments to Montana. Such claim is wrong, or speculative, or at least not proved. First, the Tribe does not pay any of the severance tax to the State of Montana. Secondly, there is no factual evidence in the record in this case, concerning what part, if any, of the coal in the ceded strip, including that being leased by Westmoreland, is property of the Tribe. The Tribe claims in its memorandum, that the Tribe owns the mineral underlying the ceded strip, and gives as authority for that allegation, the Court's decisions in *Cade v. Morton*, 527 F.2d 786, 789 (9th Circuit 1975), and the 9th Circuit's decision in this case, *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1107, 1114, n 16 (9th Cir. 1981). However, the actual issue of ownership of the coal was never litigated in *Cady v. Morton*, or in this case, *Crow Tribe v. State of Montana*. In fact, there has been no evidence of actual ownership of the coal presented by the Tribe in this case. On the other hand, there is reason to believe that at least a sizeable portion of the coal in the ceded strip is not held in trust for the Tribe. In the summer of 1981, a law student, Robert Snively, conducted a study with regard to the ownership of coal under the ceded strip. This paper, entitled "Mineral Ownership On the Crow Ceded Strip", January, 1982, which is part of Robert Snively affidavit, shows that the Tribe has a mineral interest in only approximately 8% of the total acreage in the Ceded Strip,

which 8% is not concentrated in the Westmoreland mine here involved.

There is also no evidence in the record, that the Tribe's tax has been approved by the Secretary of the Interior, and would therefore be effective and applicable to Westmoreland's operation on the ceded strip, were it not for the State of Montana's severance tax. Therefore, there is no evidence, that the Tribe is entitled to any refund, or is entitled to any of the Montana Severance Tax payment, which Westmoreland is scheduled to make in January, 1983. As the 9th Circuit noted in this case, "as to taxes already paid by Westmoreland, however, it is true that the Tribe doesn't pay any of the taxes and it is apparently not entitled to any refund if the tax statutes are declared invalid." 650 F.2d 1104, n 13.

Not only is there no evidence that the Tribe has any actual monetary stake in the severance taxes paid by Westmoreland to date or scheduled to be paid in January of 1983 by Westmoreland, but there is also no conclusive evidence that the Montana Severance Tax does or will violate any federal statute or rights and interests of the Tribe, now or in the future. As we have argued in Part B above, the decision of the 9th Circuit merely remanded the case to this Court for further hearing and factual determinations. As we have noted, the Tribe quotes certain portions of the 9th Circuit's decision, which they argue establishes the likelihood of the Tribe's prevailing in this case, and establishes the Tribe's interest in Westmoreland's severance tax payments to the State. However, as we have pointed out, it first is possible that the 9th Circuit's decision was premised on an erronous assumption regarding coal ownership, and second, the

decision of the 9th Circuit was nothing more than a remand for factual determinations and only recognizes possibilities that the State's tax may conflict with rights or interests of the Tribe.

In summary, the Tribe has established no real actual injury in order to have standing to seek a preliminary injunction, or deposit of Westmoreland's taxes. As noted, ordinarily a party has no standing to assert the rights of third persons. *Arlington Heights v. Metropolitan Housing Development Corp.*, (1977) 429 U.S. 252, 50 L.Ed2d 450, 97 S.Ct. 555. The Tribe's motion for a preliminary injunction asks the Court to enjoin the State from enforcing or collecting the Montana coal severance tax now being paid by Westmoreland to the extent that the tax is imposed on coal held in trust for the Tribe. There is no supporting factual evidence in the record showing what coal, if any, is held in trust for the Tribe in the ceded strip. The Tribe may have standing to seek a declaratory judgment to determine whether the Montana severance tax conflicts with any Federal statutes or interests of the Tribe based upon a factual record as solicited on remand by its 9th Circuit in this case, but clearly it should not be allowed injunctive relief to interrupt a tax paid by a third person, Westmoreland, when the Tribe has not established that it has any monetary interests in the severance tax scheduled to be paid by Westmoreland to the State of Montana in January, 1983.

D. RULE 67 DEPOSIT:

Federal Rule of Civil Procedure 67 provides:

"In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C. §§2041, and 2042; the Act of June 26, 1934, c. 756, §23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, §725v; or any like statute."

1. Deposit of Funds pursuant to Rule 67 is not a common practice.

Deposit of funds pursuant to Rule 67 is not a common practice as suggested by the Tribe and Westmoreland. There are not very many occassions when the Rule 67 process is applicable. *Wright and Miller, Federal Practice and Procedure:Civil*, §2991.

2. A prerequisite for allowing deposit under Rule 67, is that there be an absense of dispute regarding the depositor's liability for the amount to be deposited.

It follows that the depositor's liability to pay the total sum to someone must be undisputed. Thus where a party clings to its affirmative defenses, or does not completely concede that the full amount of taxes deposited is owed

to someone, the court will not grant leave to deposit funds with the Court. *Fed. Proc., L Ed* §24.3 – 24.5.

It is not clear from the record here, in what amount, if any, Westmoreland and the Tribe believe is undisputably owed to the State or to the Tribe. It is not clear whether Westmoreland irrevocably concedes that the Tribe has a right to tax Westmoreland in the same amount of the state's tax, despite representations that Westmoreland has reached agreement with the Tribe regarding taxes. And secondly, even if Westmoreland and the Tribe do agree that the Tribe has such right to tax Westmoreland, the effective date and the amount of such tax is also unclear. These uncertainties, which are explained below, make a Rule 67 deposit inappropriate in this case.

When the Crow Tribe and Westmoreland first entered into their agreement in 1972, no provision was made for a Crow severance tax. And there is no evidence in the record in this case that the Crow severance tax, enacted in January 1976, has been approved by the Secretary of the Interior with regard to the "Ceded Strip", and thus there is uncertainty if and when the Crow tax may be applicable to Westmoreland. Further, it is not entirely clear from the Tribe and Westmoreland's "amended coal mine lease of Indian lands", dated July 10, 1982, whether Westmoreland has unequivocally conceded that the Tribe can tax Westmoreland in the same amount as the State of Montana, should the Montana Severance Tax be found to be inapplicable to Westmoreland. For example, on page 2, paragraph 3, of the Tribe and Westmoreland's amendment of July 10, 1982, it states that "in the event the Montana Severance Tax is repealed or reduced the Crow severance tax is subject to renegotiation", and it further

states, in paragraph 5 and 6 on page 3 of the amended lease that this agreement between Westmoreland and the Tribe, "is not an admission by Westmoreland or the Tribe that the Tribe does in fact have the power to impose a tax on Westmoreland". Finally, the record here shows that Westmoreland has filed a crossclaim against the Tribe in this case, challenging the Tribe's right to tax, which cross-claim is still pending before this Court. The existence of this crossclaim indicates that Westmoreland does not agree that the Tribe's severance tax is totally applicable upon coal mined by Westmoreland, should the Montana Tax be found inapplicable. The original complaint and second amended complaint, which the Tribe filed, was not for a specific sum of money. The Tribe's third amended complaint has not yet been answered by the State but the State here denies and will deny that there is any basis for the Tribe seeking any refund or monetary award in this case. In summary, the prerequisite under F.R. Civ. P. 67 that the amount sought to be deposited must be certain and not disputed, is clearly not met in this case. Based on the record, or lack of record, before this Court, a deposit with the Court in this case is inappropriate.

On page 6 of its Memorandum in support of its motion to deposit funds, the Tribe's counsel argues that under the 9th Circuit's decision, the Tribe has demonstrated that the Tribe is likely to succeed on the merits. The Tribe claims there is a substantial likelihood that the State will be unjustly and unlawfully enriched at the expense of the Tribe and/or Westmoreland. The State strenuously disagrees with this argument advanced by the Tribe's counsel. The State does not view the 9th

Circuit decision as anything more than a remand for fact finding. As noted above in this memorandum there are statements in that decision which can be interpreted to support either party's argument that they will prevail on the merits. The fact finding solicited by the 9th Circuit's decision in this case, supports the proposition that the record is inadequate and that it is thus impossible to speculate, at this time, who will prevail in this case or how and to whom the taxes here involved will be allocated.

In any event, even if the State were to lose this case, in whole or in part, there is no question that the State is solvent and will remain a governmental entity and that the State is good for any proper judgment that may be rendered against it as a result of this litigation. Therefore, a Rule 67 deposit with the Court in this case is inappropriate.

On page 7 and 8 of the Tribe's and Westmoreland's Memorandum in support of its motion to deposit funds, it makes reference to *Conoco Inc. v. Shoshone and Araphaho* [sic] *Tribes et al.*, No. C80-181B, and *Amoco Production Company v. Robert N. Harris, et al*, C80-0208B. These cases are clearly distinguishable from this case. In the *Conoco* and *Amoco* cases, *supra*, a Tribal severance tax was involved. It is easy to understand that the oil companies would agree to a deposit of the funds, rather than pay such taxes to the Tribes. But in this case a State severance tax is involved. There may be no statutes expressing a public or Indian policy against escrowing Tribal taxes but as noted there are statutes such as the Federal anti-injunction statute, 28 U.S.C. §1341 or the Montana anti-

escrow statute, §15-1-402(7) M.C.A., which express a policy of not escrowing taxes to be paid directly to and distributed by a State. If the State and Westmoreland also want Westmoreland to pay any Crow Tribe severance tax into escrow as was done in the *Conoco* case, that may be more analogous to the *Conoco* case than having the State's tax escrowed.

The Tribe also cites the *Merrion v. Jicarilla Apache Tribe*, ___ U.S. ___, 102 S.Ct 894, 71 L.Ed2d 21 (1982) and *Ramah-Navajo School Board v. Mexico Bureau of Revenue*, ___ U.S. ___, 102 S.Ct. 3394, 73 L.Ed2d 1174 (1982) in support of its motion to deposit funds. However, both the *Merrion* and *Ramah-Navajo* cases, can also be distinguished from this case. In the first place, it is not clear from the Tribe's memorandum, how these cases support a motion to deposit funds, since it does not appear that there are any funds escrowed in those cases. Secondly, the facts in *Merrion* and *Ramah-Navajo*, are different from the case here, and therefore are not conclusive on the merits of the issues in this case. In *Merrion* the pertinent issue was the Tribe's authority to impose an occupation tax on oil and gas produced from Tribal land within the Reservation. Similarily the *Ramah-Navajo* case involved a State tax on a non-Indian company doing business on the Indian Reservation. In this case the ceded strip is not part of the reservation. *Little Light v. Crist*, 649 F.2d 683 (9th Cir. 1981). More importantly, in this case, as explained elsewhere in this Memorandum, it is unclear if and to what extent, the coal underlying the "Ceded Strip" is held in trust for the Tribe and for that reason alone the connection between the Crow Tribe and the coal under the "Ceded Strip" is more speculative and tangential than the

case of a company doing business on an Indian Reservation as in *Ramah-Navajo*, or a Tribal severance tax on oil and gas produced on an Indian Reservation as in *Merrion*. As noted above it is impossible to speculate regarding the outcome of this case until a record is developed as solicited in the remand of the 9th Circuit. In any event, the *Merrion* and *Ramah-Navajo* cases are not a persuasive basis for a deposit of the Montana Severance Tax pursuant to Rule 67.

Finally, with regard to the Tribe and Westmoreland's motion to deposit funds, the claim by the Tribe and Westmoreland that the deposit of funds with the Court is common practice, is not true. *Wright and Miller, Federal Practice and Procedure: Civil*, §2991. This is particularly the case when a State's tax is involved as the disputed funds, since there are Federal and State policies and statutory reasons why such disputed funds should not be deposited. For example, as noted above, the Federal tax injunction statute, 28 U.S.C. §1341, is based on a long standing policy to prohibit Federal interference with State taxes and clearly bars Westmoreland from seeking relief to "enjoin, suspend, or restrain" State taxes under their Rule 67 motion. Even if the Tribe can successfully argue that they fall within one of the limited exceptions to §1341, there remains. the public policy as enunciated in §1341, to have Federal District Courts take a hands-off policy with regard to interfering in the tax collection and disbursement activities of the various States. Also, the Montana Legislature, in 1979, expressed public policy that taxes paid directly to the State of Montana should not be escrowed and that the taxpayer has a remedy to sue in

State Court and seek a refund. Section 15-1-402(7), provides in part, "the provision creating the special protest fund does not apply to any payments made under protest directly to the State".

In summary, the reasons to deny a deposit of State taxes pursuant to Rule 67 far outseigh [sic] any arguments in support of such deposit.

E. INJUNCTIVE RELIEF.

1. Injunctive Relief is designed to protect Status Quo.

As a preface to this discussion in Part E of this Memorandum regarding injunctive relief, it should be noted that many of the State's arguments and facts in Parts B, C and D above of this Memorandum – regarding jurisdiction under Section 28 U.S.C. 1341, standing, and deposit under Rule 67 – are relevant to the Court's determination on the motion for a preliminary injunction. Even if the Tribe can (1) clear the first hurdle and establish jurisdiction under Section 1341 for purposes of anticipatory injunctive relief prohibiting the State from enforcement against Westmoreland a non-Indian party, or (2) clear the second hurdle and establish standing of the Tribe for purposes of injunctive relief, or (3) clear the third hurdle and establish the appropriateness of a deposit under Rule 67 – in no way can the Tribe meet the standard tests for a preliminary injunction.

First, it should be pointed out that the grant or denial of injunctive relief rests within the sound discretion of the

Trial Court. The U.S. Supreme Court has recently reaffirmed that District Courts have discretion in applying their equitable jurisdiction on requests for injunctive relief even where there are alleged violations of law. *Weinberger v. Romero-Barcelo*, ___ U.S., 50 L.W. 4434 (April 27, 1982). Second, the Tribe and Westmoreland have the burden of proof to show that they are entitled to some form of injunctive relief. Third, the overriding purpose of injunctive relief is to maintain the status quo pending trial on the merits. The 9th Circuit has been especially insistent upon this. *See*, e.g., *Miss Universe, Inc., v. Flesher*, 605 F.2d 1130 (9th Cir. 1979); *Burton v. Matanuska Valley Lines*, 244 F.2d 647, 650 (9th Cir. 1956). The status quo in this case is that for over seven years, the State has been collecting the taxes challenged here, and which the Supreme Court upheld in *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981). There is no factual evidence in the record before this Court, that Montana's severance taxes conflict with any Federal statutes or rights of the Tribe. Even if the Tribe's interpretation of the 9th Circuit decision in this case is correct, in that it established a probable conflict between the Montana severance tax and the rights of the Tribe, (to which interpretation the State strenuously disagrees), there is still no showing in the record before this Court that the Tribe is entitled to a refund or any part of the Montana severance tax or a severance tax from Westmoreland. Injunctive relief would merely interrupt the status quo of the lawful and orderly collection and disbursement of the Montana coal severance tax here in question. As noted above, the effect of the request to deposit funds with the Court, has the same effect as injunctive relief, and would also disrupt the

status quo with regard to the orderly collection and disbursement of the Montana severance tax. Injunctive relief would not preserve the status quo but would merely interrupt the status quo.

2. Standards considered on motion for preliminary injunction.

The four requirements for a preliminary injunction have been set forth previously by this Court as follows:

> (1) A reasonable probability of success on the merits;
>
> (2) Irreparable injury for which there is no adequate legal remedy.
>
> (3) Others will not suffer serious adverse effects as a consequence of the preliminary injunction;
>
> (4) . . . The effect of the requested order on the public interest.

Kelly v. Gilbert, 437 F.Supp. 210, 204 (D. Mont. 1976).

In addition to these four criteria, the 9th Circuit recognizes an alternative test for granting of a preliminary injunction which involves a balancing of hardships:

> "One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibilities of irreparable injury or serious questions are raised and the balance of hardships tip sharply in his favor."

William Einglish & Sons Baking Co. v. ITT, 526 F.2d 86, 88 (9th Cir. 1975).

This alternative test is not, however, a test entirely unrelated to the first test enunciated in *Kelly v. Gilbert, supra*, because the two tests are "merely extremes of a single continuum", *Benda v. Grand Lodge Of International Association*, 584 F.2d 308, 315 (9th Cir. 1978), with the plaintiff's hardships given more weight at one end and the plaintiff's likelihood of success given greater weight at the other end.

In applying these tests to the case here, it is clear that the Tribe and Westmoreland do not meet their requirements of either test.

3. Likelihood of success on the merits.

As the State has pointed out throughout this Memorandum, the Tribe and Westmoreland have simply not supported their allegations in their Complaints or their Motions for Injunctive Relief, with any factual evidence. Rather the Tribe and Westmoreland rely primarily on dicta from the decision of the 9th Circuit in this case. As we have shown, the decision of the 9th Circuit in this case does not demonstrate a probability that the Tribe will succeed on the merits. While the Tribe quotes certain statements of the 9th Circuit in this case, to support their allegations, as we have noted, there are also statements in the dicta of the 9th Circuit, (*See*, pages 11-12 of this Memorandum, *supra*) which would allow this Court to rule in favor of the State, after a factual record is developed before this Court. This case was before the 9th Circuit on appeal for a request for declaratory and injunctive relief, and if the 9th Circuit clearly believed that the Tribe were likely to succeed on the merits, it could have

fashioned its remand in a manner which would have had the effect of enjoining or escrowing the funds hereinvolved [sic].

And, on the other hand, the State has shown that there are threshold questions in this case, such as ownership of the coal, and effectiveness of the Tribe's severance tax, which threshhold questions raise serious doubt that the Tribe and Westmoreland will prevail on the merits in this case.

4. Irreparable injury to the Tribe and Westmoreland.

The Tribe and Westmoreland have not demonstrated that they will suffer irreparable injury, if they are denied any form of injunctive relief. As noted above, Westmoreland has other State remedies, which would allow it to sue in State Court and seek a refund if Westmoreland believes that the Montana Severance Tax is unlawful as applied to its mining operation on the ceded strip.

And, as noted above in Part B of this Memorandum, first, there is doubt whether the Tribe has a litigious interest under 28 U.S.C. 1362, which would be the basis for an exception to 28 U.S.C. §1341. As noted above, in Part C of this Memorandum, the Tribe has no proven direct injury for purposes of standing to seek injunctive relief to prevent the State from proceeding against Westmoreland, because the Tribe has not demonstrated that it is entitled to any refund, or money from Westmoreland, were it not for the Montana severance tax. The Tribe may have standing and the Tribe's Complaint may state a cause of action in order to raise its constitutional and

statutory issues concerning its rights and the Montana severance tax, for purposes of a trial with development of a record for a decision on those issues, but it has not shown that it has suffered monetary harm to date, nor would it suffer monetary harm if Westmoreland makes the Montana severance tax payment due in January, 1983. Therefore the Tribe has not shown any irreparable injury if the relief it seeks here is denied. There is no evidence in the record to show what part, if any, of the mineral underlying the Westmoreland resources actually belongs to the Tribe, and there is no evidence to show that the Tribe's severance tax would be in effect on the ceded strip and applicable to Westmoreland were it not for the State's severance tax. There is evidence, based on the fact that Westmoreland has filed a counterclaim against the Tribe challenging the Tribe's right to tax Westmoreland, that the Tribe may not receive any money, even if the Montana tax were not in existence.

Even if it is determined by a proper authority, now or later that the Tribe is entitled to part of Westmoreland's State severance tax, such money is recorded, traceable and refundable by the State, as pointed out in the affidavit of David M. Lewis.

Therefore, the Tribe has simply not shown that it will suffer irreparable harm if injunctive relief is denied.

5. Irreparable injury to the State.

As noted in the attached Affidavit of David M. Lewis, Director of the office of Budget and Program Planning of the State of Montana, the relief sought by the Tribe and Westmoreland to deposit the funds and enjoin the State

from collecting and enforcing the Montana severance tax, would disrupt the orderly collection and disbursement of the Montana severance tax. Because Westmoreland would continue its mining operations here in question, there would be impacts from the mining operation, and Westmoreland's contribution to mitigate those impacts would be impounded. For example, money from the Montana severance tax goes for the benefit of law enforcement, schools, and road construction and maintenance, in areas including the area of Westmoreland's mining operation and it is unfair and injurious to the State to allow Westmoreland to continue mining with its attendant impacts, while at the same time impounding the taxes intended to address such impacts.

6. Public interest.

As noted above, there are both Federal and State statutes, which have been interpreted by the Courts, to reflect the public interest and preference of restricting Federal Courts from issuing any type of injunctive relief or interfering with the payment or disbursement of State taxes. (§15-1-402(7); and 28 U.S.C. §1341.) In this case the public interest will be served by denying the deposit of funds and injunctive relief. The Tribe and Westmoreland have demonstrated no public interest to be served by depositing the funds or issuing a preliminary injunction. On the other hand, as pointed out in the Affidavit of David M. Lewis, the public would suffer if the funds are escrowed or a preliminary injunction is issued.

7. Alternative tests involving balance of hardships.

The Tribe and Westmoreland have not met their burden of proof with actual factual evidence to show that they meet the alternative test of a preliminary injunction, involving balancing of the hardships. The Tribe and Westmoreland have not shown that the denial of injunctive type relief, including deposit of funds, would deprive them of a remedy should they succeed on the merits in this case. As noted above, the Tribe has not demonstrated that it is entitled to any of the Montana severance tax which Westmoreland will pay in January of 1983, and even if they could show they are entitled, they have not shown that they would not be able to remedy such injury. Westmoreland has another remedy, to sue in State Court, and seek a refund. The balance of the hardships go against the Tribe and Westmoreland in their request for injunctive type relief, because they have not shown any immediate injury resulting from Westmoreland's tax payment to the State on or prior to January 1983. The state has shown that even if the Tribe and Westmoreland succeed on the merits, the Tribe and Westmoreland have a remedy, because the severance tax payments here are recorded traceable, and refundable, from a solvent and dependable entity, the State of Montana, if such refund is authorized by a proper judgment by any court with proper jurisdiction and authority. On the other hand, the State has shown that injunctive type relief, or deposit of funds, could likely cause greater mischief than denial of such relief to the Tribe and Westmoreland, as pointed out in the affidavit of David M. Lewis. Any injunctive type relief before there is any development of a factual record in this case, may only serve to complicate the litigation,

and cause an interference with and hardship to the State of Montana and the public generally. If Westmoreland is allowed to continue its mining operations, without the State collecting and dispersing the severance tax designed to mitigate impacts from such mining, the public will suffer. If the funds are escrowed, on one, the State, the public or the Tribe receives the use or benefit of those funds while they are escrowed.

In summary, the Tribe and Westmoreland fair [sic] no better in meeting the alternative test for any injunctive type relief than they do in meeting the requirements enunciated in *Kelly v. Gilbert*, 437 F.Supp. 201, 204 (D. Mont. 1976). The arguments of the Tribe and Westmoreland in support of their motions here are based primarily on their verified Complaint and brief affidavits, and as indicated, the State intends and will have filed a verified Answer denying the allegations of the Tribe. Courts have held that where a party seeks injunctive type relief relying primarily on verified complaints and affidavits, which are denied by a verified answer and affidavits and there is no other evidence introduced the exercise of discretion normally calls for denial of injunctive type relief.

In conclusion, the Tribe and Westmoreland have clearly not met their burden of proof and clearly this is not a case for any type of injunctive relief.

Respectfully submitted this 13th day of December, 1982.

ANDERSON, BROWN, GERBASE,
CEBULL & JONES, P.C.

BY: /s/ John W. Ross
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al., Plaintiffs,	)	No. CV-78-110-BLG
-v-	)	
THE STATE OF MONTANA, et al., Defendants.	)	

AFFIDAVIT

David M. Lewis, being first duly sworn, deposes as follows:

1. That I am the Director of the Office of Budget and Program Planning of the State of Montana, duly appointed by the Governor.

2. That my duties as Director of the Office of Budget and Program Planning include preparation of the Governor's Executive Budget Request for presentation to the Legislature.

3. That I have been informed that the plaintiffs have requested the Court to escrow future coal severance tax payments from the Westmorland Mine, and that this would result in the funds being unavailable to the State during the pendency of this litigation.

4. That the plainitff's [sic] request, if granted would impede the State's budgeting and planning efforts at least during the period the funds would be held in escrow;

5. That there is a State policy, as evidenced by section 15-1-402, MCA, that taxes owed to the State and taxes paid in protest not be placed into an escrow account or protest fund.

6. That if the coal severance tax funds collected from the Westmorland Mine are not available to the State, the impacts of that mine and the concurrent needs of the area will nonetheless continue without a continuing source of funding to alleviate those impacts. Substantial portions of the money collected from the Westmoreland Mine are specifically allocated for local impacts such as schools and highway improvement. *See* section 15-35-108, MCA.

7. That even if the escrowed taxes were placed in an interest bearing account, there is no perceivable way that the State and its affected citizens could be made whole for the losses the State and its citizens would sustain because of the unavailability of the funds for the uses

contemplated by section 15-35-108, MCA. Such uses include, but are not limited to, construction and/or expansion of school facilities, additions to and maintenance of highway facilities, augmentation of law enforcement staffs and facilities as determined to be necessary by appropriate boards and commissions, loss of funding in the area of development of alternative energy sources, and loss of funding for State equalization aid in the public schools of the State of Montana.

If the monies are not available during the pendency of this proceeding for the uses contemplated by section 15-35-108, MCA, the State and its citizens will be deprived of the facilities which could be provided through the use of the funds and thus would suffer great inconvenience and hardship during that period of time. Inflationary increases in the cost of providing the facilities contemplated by section 15-35-108, MCA, are certain to cause substantial increases in such future costs, which increases cannot be set off by income gained by the funds while they are sequested in the subject interest bearing account.

The members of the plaintiff Crow Tribe as well as the citizen domiciled in Big Horn and surrounding counties participate in certain uses of the funds as provided in section 15-35-108, MCA, and thus benefit from the continued collection and availability of the funds for public purposes. Thus, not only would the public interest of citizens of Montana domiciled off the reservation be deliterously affected by the unavailability of the funds, but the plaintiff tribe itself would be adversely affected by a cessation of the collection and uses of the funds by the State of Montana. This is particularly true because no

one, including the tribe, would have access to the funds during the pendency of this action should the State be enjoined from collecting the funds and should the funds be sequestered into a court administered account as contemplated by the pending motions.

8. That an accounting of monies paid by Westmoreland to the State of Montana is maintained by the State Department of Revenue so that the amounts of such payments can be determined from time to time. It is unnecessary to order the escrow of any funds paid by Westmoreland to the State because the State is fully capable of meeting any obligations which might ultimately arise as the result of any proper judgment, order or decree issued by any court with proper jurisdiction and authority as the result of this litgation.

FURTHER AFFIANT SAYETH NOT.

DATED this 8th day of December, 1982.

/s/ David M. Lewis
DAVID M. LEWIS, Director
Office of Budget and
Program Planning

STATE OF MONTANA)
: ss
County of Lewis and Clark)

First being duly sworn, the above, David M. Lewis, personally appeared before me, who, upon oath, swore that he has read the foregoing affidavit and that the

statements therein are true to the best of his knowledge and belief.

SUBSCRIBED AND SWORN to before me this 8th day of December, 1982.

/s/ Irma Paul
Notary Public for the
State of Montana.
Residing at Helena, Mt.
My Commission expires 1-11-83.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, v. THE STATE OF MONTANA, et al., Defendants, and WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	)	Civil Action No. CV-78-110-Blg

ANSWER OF INTERVENOR DEFENDANT WESTMORELAND RESOURCES, INC. TO PLAINTIFF'S THIRD AMENDED COMPLAINT, INCLUDING COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFF, AND CROSS-CLAIM FOR DECLARATORY RELIEF AGAINST DEFENDANTS

Westmoreland Resources, Inc. ("Westmoreland") answers plaintiff's Third Amended Complaint as follows:

1. Admitted that this Court has jurisdiction over this controversy and that venue is proper.

2.-13. Admitted as to statements of fact. To the extent that plaintiff avers conclusions of law, no answer is required.

14.-15. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 14 and 15.

16.-17. Admitted.

18. Admitted, except that the $54,000,000 figure should be $47,436,000, and the $7,000,000 figure represents gross proceeds taxes paid from operations on all Westmoreland leases in the ceded strip.

19. Admitted, except that Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the numbers contained in paragraph 19.

20. Admitted, except that Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averment that the unemployment rate of tribal members is much higher than among the non-Indian populations of Montana and adjacent states.

21. Denied as stated. Westmoreland admits that the existing lease between it and the Tribe requires it to pay a tax to the Tribe in amounts equal to the applicable Montana tax with a tax credit for whatever amount it is required to pay to the State. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments as they relate to the Shell lease.

22. Admitted that the taxes are a direct and major cost associated with the production of Crow coal. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the other averments in paragraph 22.

23. Admitted that the consequences of these taxes have been to drastically increase costs to purchasers of Crow coal, to severely restrict the royalty payments which Westmoreland has been willing to pay to the Tribe, and to discourage Westmoreland from renegotiating its lease with the Tribe. Admitted the second sentence of averment 23. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of those averments in paragraph 23 which relate to other lessees of the Tribe.

24.-26. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 24-26.

27.-28. Admitted as to statements of fact. To the extent plaintiff avers conclusions of law, no answer is required.

29.-33. As to statements of fact, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 29-33, except that it is admitted [in paragraph 31] that Montana's taxes on coal production are significantly greater than comparable taxes imposed by other states. To the extent plaintiff avers conclusions of law no answer is required.

34. Admitted, but Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averment that the Crow Tribe has enacted a gross proceeds tax.

35. Admitted that the Crow Tribe and Westmoreland have amended their coal mining lease and that the Amendment was approved by the BIA on September 29, 1982. Denied that Westmoreland has recognized the right of the Crow Tribe to impose taxes on the ceded strip. Rather, by the Amendment, Westmoreland agreed to pay the Crow Tribe severance and gross proceed taxes (of an amount comparable to that imposed by Montana and its subdivisions) less all severance and gross proceed taxes actually paid to Montana and its subdivisions. The Amendment specifically provides that Westmoreland does not admit [through the act of signing the Amendment] that the Crow Tribe has the power to tax on the ceded strip, and further the Amendment provides that under certain circumstances Westmoreland and the Crow Tribe are free to litigate the power of the Tribe to tax Westmoreland, as if the Amendment never existed.

36.-41. As to statements of fact, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 36-41. To the extent plaintiff avers conclusions of law no answer is required.

42.-43. As to statements of fact, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 42-43. To the extent plaintiff avers conclusions of law no answer is required. Should the Court determine

that the Crow Tribe is either entitled to a refund of severance and gross proceed taxes or restitution of illegally collected tax funds, Westmoreland and its customers are entitled to all or substantially all of the severance and gross proceed taxes which have been paid to Montana from production on the ceded strip.

44. Admitted.

45.-46. As to statements of fact, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 45-46. To the extent plaintiff avers conclusions of law no answer is required. Should the Court determine that the Crow Tribe is either entitled to a constructive trust or the value of wrongfully converted property, both measured by the severance and gross proceeds taxes collected by Montana, Westmoreland and its customers are entitled to all or substantially all of the severance and gross proceed taxes which have been paid to Montana from production on the ceded strip.

47. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 47.

COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFF

1. The allegations of paragraphs 1 through 47 of plaintiff's Third Amended Complaint and the answers thereto of intervenor defendant Westmoreland Resources, Inc. ("Westmoreland"), are incorporated herein by reference.

2. Westmoreland has a vital interest, as lessee of ceded area lands and mineral rights and as a company mining coal on the ceded strip, in the authority of the Tribe and Montana to impose taxes upon it.

3. Should the Court determine that the Crow Tribe is entitled to all or part of the severance and gross proceeds taxes which Westmoreland has paid and continues to pay to Montana, Westmoreland claims that it and its utility customers are entitled to all or substantially all of such unlawfully paid taxes up until September 29, 1982, the effective date of the Amended Lease.

4. Westmoreland has no adequate remedy at law. WHEREFORE, Westmoreland requests this Court: (a) To grant Westmoreland all or substantially all of the Montana severance and gross proceeds taxes which the Court finds, on the basis of the claims of the Crow Tribe in this action, have been unlawfully imposed and collected by Montana; and

(b) To grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

CROSS-CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST DEFENDANTS

1. The allegations of paragraphs 1 through 47 of plaintiff's Third Amended Complaint and the answers thereto of intervenor defendant Westmoreland Resources, Inc. are incorporated herein by reference.

2. Westmoreland has a vital interest, as lessee of ceded area lands and mineral rights and as a company

mining coal on the ceded area, in the authority of the Tribe and Montana to impose taxes upon it.

3. Should the Court determine that the Crow Tribe is entitled to all or a part of the severance and gross proceeds taxes which Westmoreland has paid and continues to pay to Montana, Westmoreland claims that it and its utility customers are entitled to all or substantially all of such unlawfully paid taxes up until September 29, 1982, the effective date of the Amended Lease.

4. Westmoreland has no adequate remedy at law and is suffering irreparable harm.

WHEREFORE, Westmoreland requests the Court: (a) To grant Westmoreland all or substantially all of the Montana severance and gross proceeds taxes which the Court finds, on the basis of the claims of the Crow Tribe in this action, have been unlawfully imposed and collected by Montana; and

(b) To grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

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Dated: December 20, 1982

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of December, 1982, I mailed a true and correct copy of the above ANSWER OF INTERVENOR DEFENDANT WESTMORELAND RESOURCES, INC. TO PLAINTIFF'S THIRD AMENDED COMPLAINT, INCLUDING COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFF, AND CROSS-CLAIM FOR DECLARATORY RELIEF AGAINST DEFENDANTS, postage prepaid for first class delivery by United States mail, addressed to the following:

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No. 96-1829

Supreme Court, U.S.
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NOV 26 1997
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In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

CROW TRIBE OF INDIANS; and
UNITED STATES OF AMERICA,

Respondents.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS,
Plaintiff,
-vs-
THE STATE OF MONTANA, et al.,
Defendants,
and
WESTMORELAND RESOURCES, INC.,
Defendant-Intervenor.

CV-78-110-blg
ORDER
(Filed Jan. 6, 1983)

This Court, having considered the briefs of the parties and oral argument held on December 30, 1982, rules as follows:

IT IS ORDERED that plaintiff's motion, pursuant to Rule 67, Fed.R.Civ.P.,to deposit the total Montana coal severance tax payments of Westmoreland Resources, Inc., for coal mining on the ceded strip outside the Crow Reservation, into the registry of the Court until the final resolution of this action, is granted. Payments into this Court shall be deposited on the schedule and in the amounts determined by Montana law for payment of the severence tax, and shall be deposited into an insured interest-bearing account.

IT IS FURTHER ORDERED that plaintiff's motion for a preliminary injunction enjoining defendants State of Montana and Montana Director of Revenue, their agents, employees, and attorneys from taking any action to enforce or collect the Montana coal severance tax from defendant Westmoreland Resources, Inc., or to penalize Westmoreland Resources for failure to pay the tax directly to the state, to the extent that the tax is imposed on coal produced from coal deposits on the ceded strip, is granted, provided that amounts claimed by Montana as taxes are deposited with the Court by Westmoreland Resources, Inc., as directed above.

Jurisdiction lies in this Court by 28 U.S.C. § 1362. Jurisdiction is not barred by 28 U.S.C. § 1341. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). That the Crow Tribe [Tribe] has standing to challenge the state severance tax may be implied from the Ninth Circuit Court of Appeals decision that the Tribe's claim stated a cause of action. *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981). Further, the lease agreement between the Tribe and Westmoreland Resources, Inc. [Westmoreland] (requiring Westmoreland to pay the Tribe an amount equal to the Montana severance tax, but not more in total severance tax payments to Montana and the Tribe, than the Montana severance tax) surely gives the Tribe a direct monetary interest in the validity of the severance tax because Westmoreland need not pay Tribal severance tax if Westmoreland pays the Montana severance tax.

The dispute between the Tribe and Montana over the moneys paid by Westmoreland as a severance tax on Indian-owned, off-reservation coal is an appropriate case

for deposit into the Court of the moneys over which ownership is disputed. Rule 67, Fed.R.Civ.P. *See Moore's Federal Practice*, ¶ 67.0, *et seq*. The certainty of the amount and the established payment schedule simplify logistical difficulties that might be associated with such a large sum of money, estimated to be $2,600,000 per quarter.

This Court grants a preliminary injunction to prevent the State of Montana from attempting to collect a coal severance tax from Westmoreland for coal mined on the ceded strip, and to prevent any possible penalty imposed upon Westmoreland for failure to pay the tax money directly to the State. The test that this Court must apply in determining whether preliminary injunction should be granted is set out in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975). This Court will issue a preliminary injunction when, "serious questions are raised and the balance of hardships tips sharply in [plaintiff's] favor." *Id.* at 88. The Tribe has met this burden. Serious questions as to Montana's right to tax an Indian-owned, off-Reservation mineral development are addressed in this suit; serious harm may come to the Tribe if the tax moneys paid by Westmoreland to the State are never made available to the Tribe. (As noted by the Ninth Circuit Court in *Crow*, the Tribe is apparently not entitled to any refund of taxes previously paid by Westmoreland to Montana if the Montana tax statutes are declared invalid. *Id.* at n. 13, 1113.) On the Montana side of the balancing equation, the amount of tax money to be deposited, and the lesser amount available for the general fund (50% of the total tax) are a fractional percentage of the Montana state budget. Further, the shortfall to the State can be met by an appropriation of the

necessary amount from the 50% Constitutional trust fund. This Court is aware that a three-fourths vote of the Legislature is necessary to "liberate" those funds; however, if the money is required by the State, it is available to the State – no such mitigating opportunity is available to the Tribe. On the other hand, the Tribe remains heavily in debt. (*See* Affidavits of Gale Loomis and Donald A. Stewart, Sr.) Of course, while the money is deposited with the Court, it will be unavailable to the Tribe; but if the Tribe should prevail, the money will help to solve the debt problem of the Crow Tribe.

As noted by the Ninth Circuit in *Inglis, supra,* it is not necessary that the moving party be reasonably certain to succeed on the merits; if the harm that may occur to the plaintiff is sufficiently serious, it is only necessary that there be a fair chance of success on the merits. *Inglis,* at 88. This Court's reading of the Ninth Circuit decision in *Crow* holds that decision to read that if the facts are as alleged by the Tribe, and the balance of interests of the Tribe outweigh the state's, and the off-reservation nature. of the coal is somehow mitigated, then the Tribe may prevail. No findings of fact or weighing of balance tests were done by the Circuit, or by this Court in its prior consideration of this matter. However, in the opinion of this Court, the Tribe has met its burden to show that there is a fair chance that it will succeed on the merits.

If Montana ultimately prevails, the deposited funds plus interest will be turned over to the State and tax collection will proceed as it has in the past. If the Tribe prevails, the funds deposited with the Court are the Tribe's and, as such, the moneys would belong to them. Without the deposit to the Court, a victory by the Tribe

on the merits would not give it the tax moneys paid by Westmoreland to Montana prior to entry of the hypothetical victorious judgment. *Crow* at 1113. A deposit of tax moneys into the Court would remedy this inequity simply and effectively.

If this Court is to preserve its power to render a meaningful decision – giving the tax moneys to their rightful owner after a trial on the merits – the deposit of tax moneys into the Courts and the concomitent [sic] injunction against the State is essential.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 6th day of January, 1983.

/s/ James A. Battin
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al, Plaintiffs, vs. UNITED STATES OF AMERICA, et al, Plaintiff-Intervenor, vs. STATE OF MONTANA: ELLEN FEAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; YELLOWSTONE COUNTY, Montana; TREASURE COUNTY, Montana; LORRAIN HAMILTON, Treasurer, Big Horn County, Montana; MAY JENKINS, Treasurer, Yellowstone County, Montana; CLARIBEL BONINE, Treasurer, Treasure County, Montana, Defendants. WESTMORELAND RESOURCES, INC. Defendant-Intervenor.	)	No. CV-78-110-BLG Volume I

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for trial in open court before the HONORABLE JAMES F. BATTIN, United States District Court Judge, on Monday, January 9, 1984, commencing at approximately 9:00 a.m.

* * *

[p. 55] Q [By Steven E. Carroll] Are you aware of whether the Crow Tribe has enacted a tax ordinance on coal?

A [By Wyman P. Babby] The Tribe enacted a coal tax in 1976.

[p. 56] Q Are any taxes being collected under that Act on the Westmoreland lease?

A None.

Q Why is that?

A The arrangements that the Tribe has entered into with Westmoreland, provides that the company would receive credit for those tax burdens that it carries that must be paid to the State. Now, the tribal tax is set at a 25 percent level. The effect of the taxes, as I understand them, at the moment, that Westmoreland must comply with with the State, is at approximately 25 percent.

Q Has the Secretary approved the imposition of the gross severance tax on the Westmoreland coal?

A No, and that is a particular problem that the tribal government has attempted to address on a number of occasions over these last few years.

Q What is the nature of the problem?

A The problem is occasioned by the fact that the Tribe in its constitution has disclaimed jurisdiction outside the boundaries of the reservation, and the Secretary has indicated that that is an impediment to his being able to approve the tax ordinance until such time as it is corrected.

[p. 716] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al, Plaintiffs, vs. UNITED STATES OF AMERICA, et al, Plaintiff-Intervenor, vs. STATE OF MONTANA: ELLEN FEAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; YELLOWSTONE COUNTY, Montana; TREASURE COUNTY, Montana; LORRAIN HAMILTON, Treasurer, Big Horn County, Montana; MAY JENKINS, Treasurer, Yellowstone County, Montana; CLARIBEL BONINE, Treasurer, Treasure County, Montana, Defendants. WESTMORELAND RESOURCES, INC. Defendant-Intervenor.	No. CV-78-110-BLG Volume V

TRANSCRIPT OF PROCEEDINGS

Trial resume [sic] in the above-entitled matter in open court before the HONORABLE JAMES F. BATTIN, United States District Court Judge, on Friday, January 13, 1984, commencing at approximately 9:00 a.m.

* * *

[p. 765] Q [By John W. Ross] With regard to the Tribe's tax, is that a constitutional provision; in other words, is the Tribal tax provision in the Constitution of the Crow Tribe?

A [By Patrick Stands Over Bull] Yes, it is.

Q And can you tell me when it was voted upon as a constitutional enactment?

A It was included in the Constitution from the time the Constitution was developed back in the late 40's, but the Constitution never specified what type of taxes until 1976, January, that we amended the Constitution to include the 25 percent severance tax.

Q And who drafted that 25 percent severance tax?

A That was the Tribal attorneys at the time.

Q And are you aware of whether or not Senator Tom Towe of Montana has assisted the Tribe at all in the drafting of its severance tax?

A I don't recall.

Q Do you know whether or not the Tribe's severance tax provides credits against the tax for any other taxes or royalties?

A I believe that was the reason why we set up our [p. 766] office of research to develop these, which we don't have at the time, and they were to develop the figures and so forth, which I am not too familiar to be –

Q So you are not really sure whether or not the way the tax is calculated –

A The 25 percent was to go under – the figure come up by the State of Montana. So by imposing that 25, we would be able to have a better opportunity and give it the opportunity to negotiate with the coal company.

Q But you are not really certain whether the way the tax is actually calculated, whether or not it would be more or less than 25 percent; is that right?

A Could you restate that please? I am not aware of –

Q You are not aware of the actual calculation of the tax would result in a tax, say, of more than 25 percent?

A Not to the extent of specific figures, no, I am not.

Q And are you aware that the tax that's referred to in the Westmoreland 1982 agreement would provide for a tax of the same magnitude as the State of Montana tax?

A You said 1982.

Q Are you aware that there is an agreement between Westmoreland and the Crow Tribe that was entered into in 1982 that provides that if the Crow Tribe wins this case, [p. 767] they'll get a tax payment that's of the same magnitude of the State's tax? Are you aware of that?

A I am aware of it, but I wasn't involved in the negotiation.

Q And you are aware, aren't you, that the Tribe's constitutional severance tax has not yet been approved as it would apply on the ceded area?

A Yes, I am.

Q Are you aware that the Secretary of Interior has issued guidelines for the development of Tribal severance taxes?

A Yes, I am aware of it.

Q And are you aware that those guidelines require that before a severance – an Indian severance tax is enacted that notice should be given 30 days in advance to the public?

A I –

Q Would you like me to repeat the question?

A Would you, please?

Q Are you aware that those guidelines issued by the Department of Interior require that prior to adopting a Tribal severance tax, that notice should be given in newspapers and that sort of thing to the public advising them that the Tribe is considering a severance tax?

A Yes, yes, I am aware of that.

Q And are you aware that the Secretary is not [p. 768] supposed to approve a severance tax unless these notice requirements have been followed?

A Yes.

Q Prior to the adoption of the Tribe's constitutional severance tax, was notice given to the general public and an opportunity for, say, the coal companies to come in and express their views on that tax?

A I believe we did as part of the procedures – any time you want to amend the constitution, we follow the proper procedures.

Q Did any coal companies actually come in and make any statements or provide any testimony prior to the adoption of the Crow Tribe's constitutional severance tax?

A They have expressed their concern at the time, but I don't recall the specific meeting.

Q But you are not aware that they actually appeared at any hearing and expressed their views; is that right?

A I can't recall.

Q Isn't it true that the Secretary has indicated that he will not approve the Crow severance tax on the ceded area until there is a change in the Crow's constitution? Are you aware of that?

A I believe so, yes.

* * *

[p. 772] REDIRECT EXAMINATION

Q. [By Robert S. Pelcyger] And then finally, would you like to clarify or correct the testimony that you gave concerning the Tribal severance tax that was enacted in 1976?

[p. 773]A Yes. 1976, I stated there was a constitutional amendment, however, I was mistaken. I recall it was an ordinance that was passed in 1976.

Q Do you recall what constitutional provision was involved in that whole process of severance tax issue?

A The constitutional provision never relates to severance tax in the Constitution. It was – the Constitution just was a general tax, never specified a severance tax, and this is why we came up with an ordinance to impose a severance tax in '76.

Q Was there a problem so far as the tax was permissible under the Constitution as applied to the ceded area?

A Excuse me. Would you say that again?

Q Was there a problem under the Constitution as to whether the Tribe had the authority to impose a severance tax on the minerals in the ceded area?

A That's right.

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiffs, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, -v- THE STATE OF MONTANA, Defendants, and WESTMORELAND RESOURCES, Defendant-Intervenor.	)	NO. CV-78-110-BLG **DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION AND LEAVE TO DEPOSIT FUNDS INTO COURT**

I.

INTRODUCTION

The Motions presently before the Court seek to have the Court Order that all of Westmoreland's gross proceeds tax payments due in the future and commencing with the May 31, 1984 payment on coal produced on the ceded area, under lease from the Crow Tribe, be deposited into Court pending the outcome of this litigation. In January, 1983, in response to Motions filed jointly by the Crow Tribe and Westmoreland Resources in November of 1982, this Court entered its Order directing Westmoreland to pay its coal severance tax payments into the Court and enjoined the State from taking action to collect the severance tax pending the outcome of this case. The 1982 Motions explicitly did not seek relief regarding Westmoreland's gross proceeds tax payments. Now, some sixteen months after this Court's actions regarding the severance tax payments, the Tribe, the United States, and Westmoreland, are once again asking the Court to interfere with the orderly collection of State taxes by seeking similar relief from Westmoreland's obligation to pay gross proceeds taxes to Big Horn County.

There are numerous reasons why the Motions before the Court should be denied. In order to more fully understand some of these reasons against deposit of Westmoreland gross proceeds payments to Big Horn County into Court at this time, it may be useful to present a general explanation of the gross proceeds tax as it relates to the method of establishing "taxable valuations" and the County budget and expenditure process.

Therefore, this Memorandum will first generally review the gross proceeds tax, and the County budget and expenditure process. Second, this Memorandum will review some of the previous arguments against deposit of Westmoreland's severance tax payment, particularly as they relate now to the gross proceeds tax. Third, this Memorandum will present arguments against deposit of the gross proceeds tax at this time, based on the established tests for a preliminary injunction, which tests which tests involve an inquiry into the probable success on the merits, the possibility of irreparable injury or serious questions being raised, the adequacy of available remedies to the parties, and involve a balancing of interests and potential injury to the Plaintiff, the Defendants, and the public generally. These tests must be considered with some understanding of the gross proceeds tax and the County budget and expenditure process, which is no simple matter, which, in itself, is one reason why a Court should be reluctant to interfere with the orderly working of that process, and not further complicate such process.

II.

EXPLANATION OF GROSS PROCEEDS TAX AND COUNTY BUDGET AND EXPENDITURE PROCESS

To understand the disruption and difficulties that would be encountered by Big Horn County and other political entities as a result of the deposit of Westmoreland's gross proceeds tax, it is necessary to understand Montana's County budget process and the method of establishing and collecting property taxes.

The taxation and collection of the gross proceeds taxes are part of the property tax system. The value of gross proceeds from the sale of coal is included in the total "taxable valuation" for the County and the value of the gross proceeds is taxed at the general County mill rate.

The basic County budget process is set forth at §7-6-2301, M.C.A., et seq. It requires that on June 1 of each year, the County Clerk and Recorder notify each County official and that each County official, by June 10, submit a detailed estimate of reserves and expenditures for their office for the next year. The County Commissioners, pursuant to §7-6-2311, M.C.A., must prepare a budget statement showing all new road and bridge construction, together with the costs of construction. The Clerk and Recorder then tabulates and classifies these estimates of income and expenditures from the various county offices and County Commissioners. A preliminary budget is then prepared. The Commissioners then determine how much money is estimated to be received from all sources, including taxes, and the Commissioners then determine, pursuant to §7-6-2318 and §7-6-2319, M.C.A., how much money is estimated to be received from all sources, including taxes, and determine how much must be raised by a tax levy. The final budget is then adopted after notice and hearing, and the tax level is established on the second Monday of August, pursuant to §7-6-2321, M.C.A. The Department of Revenue certifies to the County, the "taxable valuation", which includes the gross proceeds of a coal mine. This County budget system is designed to produce a balanced budget. The Commissioners take the expenditure requirement estimates,

determine the non-tax revenue estimates, and then set a tax levy to make up the difference to provide a balanced budget. The tax levy is figured by taking the revenue requirements and dividing them into "taxable valuation" to yield a mill rate.

Taxes for a fiscal year, which runs from July 1 to June 30, are raised by this mill rate. The first half taxes are to be paid by November 30, and the second half taxes by June 1 of the following year.

The collection of the May 31 payment generally funds expenditures which have already been made or committed to be made. The local entities sometimes can try to shift around, to the extent allowed, cash from all sources in anticipation of receipt of these May 31 tax payments. Counties and school districts are legally prohibited, under §7-6-2325, M.C.A., from making transfers between funds, and within a fund only limited transfers may be made. It is impossible to shift funds from relatively less important services to absolutely essential services. The net effect of a deposit of Westmoreland's May 31, 1984 gross proceeds tax payment with the court, is that the County funds necessary for County and school operations in the current fiscal year will be unavailable. There is no realistic procedure by which to avoid serious disruption to County government and school districts, in the event Westmoreland gross proceeds tax, particularly its May 31, 1984 payment, is deposited with the Court. Only if the Court were to order the Department of Revenue to reduce the County and school districts "taxable valuation" by the amount of Westmoreland's gross proceeds tax payment, and permit the County to recalculate the mill levy on this new reduced "taxable valuation" (up

to the legal maximum), and reissue the tax assessments with new higher tax rates, and collect additional taxes, would the County raise necessary funds to meet expenditures which have already been made or will be made in June of this fiscal year, which ends July 1, 1984.

Because of the schedule of the budgeting and tax collection process of the County, an interruption of a gross proceeds tax payment to be paid on May 31 is the worst time for the County for such an interruption of payment. And this timing problem is compounded in the present situation in Big Horn County, as evidenced by the attached Affidavits of Big Horn County and school officials, because Westmoreland's gross proceeds payment makes up a substantial portion of the County's tax revenues, and because many of the budgets have already been expended in anticipation of receipt of the May 31 tax payments. Moreover, there is no speedy or adequate remedy available to the County to make up this shortfall that would occur if Westmoreland's May 31, 1984 payment is withheld. It is important to keep in mind that the tax rate is dependent upon total "taxable valuation", which includes the gross proceeds value as its single largest part. If the County is not going to receive money from Westmoreland gross proceeds, then such gross proceeds should not be in the "taxable valuation" and the mill rate would have to be substantially higher to raise the money required to operate government. But because the Westmoreland's gross proceeds were considered part of the "taxable valuation" of the County for the current fiscal year, the County budget and expenditures have been made in reliance upon receipt of Westmoreland's May 31 payment. Moreover, the County, under State statute, must

continue to treat Westmoreland's gross proceeds as part of the County's "taxable valuation", unless an Order from this Court could somehow rule otherwise. The only other feasible alternative would be for the County to greatly inflate their budgets based upon Westmoreland's gross proceeds being part of the "taxable valuation" and if they did not in fact receive Westmoreland's payment their overinflated budget would be enough to at least meet essential services. But, of course, all of this would take time and be no solution to the immediate shortfalls in the current year ending June 30, 1984, in the event that Westmoreland's May 31, 1984 payment is put in escrow. Obviously the County budget and taxation process is not one that could readily, quickly, or easily adjust to the escrowing of a tax payment, particularly one that is due on May 31, which is late in the County's fiscal year.

The attached Affidavits of various officials of Big Horn County further illustrate the disruption and difficulties that would be encountered by Big Horn County and Big Horn County schools in the event that Westmoreland's May 31 gross proceeds tax payment is deposited in escrow.

III.

REVIEW OF PREVIOUS ARGUMENTS AGAINST A PRELIMINARY INJUNCTION AND DEPOSIT OF FUNDS, PARTICULARLY AS THEY APPLY TO THE CURRENT REQUEST FOR AN INJUNCTION AND DEPOSIT OF THE GROSS PROCEEDS TAX

All of the Defendants' arguments previously asserted in opposition to the Crow Tribe and Westmoreland's

Motions for Preliminary Injunction and Deposit of Westmoreland's severance tax, Defendants still believe are relevant in objection to the present Motions. However there are now reasons why those arguments are more persuasive as they relate to the present request to deposit Westmoreland's gross proceeds tax.

The Defendants argued in opposition to the Tribe and Westmoreland's November, 1982 Motions, with regard to the severance tax, that neither the Tribe nor Westmoreland had standing to seek the requested relief. Defendants again contend that neither the Tribe nor Westmoreland have standing to seek the relief requested by the present Motions. Westmoreland is the taxpayer, but its Motion is clearly barred by 28 U.S.C. §1341. The Tax Injunction Act, 28 U.S.C. §1341, provides that:

> District Courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in Courts of such state.

Defendants recognize that § 1341 does not bar an action by the Tribe in certain cases brought under 28 U.S.C. §1362. *Moe v. Confederated Salish and Kootenai Tribes*, 425 US. 463, 470-75 (1976). However, in *Moe*, the challenged tax was paid by tribal members. Here, in contrast, the tax is paid by Westmoreland, a non-Indian corporation. Nothing in *Moe* suggests that an Indian Tribe has standing to sue under 28 U.S.C. §1362 to enjoin the collection of taxes from a non-Indian. And, although the United States has now intervened since the November, 1982 Motions, and has joined in the present Motions, Defendants submit that the United States has no greater claim

to standing than the Tribe or Westmoreland. Like the Tribe, the United States is not the taxpayer. The Tribe is not the taxpayer, and its claims to Westmoreland's tax payments are tenuous at best. The record from the trial in this case clearly shows that the Tribe does not have a gross proceeds tax, which has been approved by the Secretary of the Interior, under which the Tribe could apply and collect a gross proceeds tax on the ceded area, even in the absence of the County's gross proceeds tax. Recognizing that neither the Tribe nor Westmoreland could individually seek relief, the movants have contrived a lease amendment which purports to assign to the Tribe, an interest in Westmoreland's gross proceeds tax and Westmoreland's status as a taxpayer. Defendants submit that such an agreement cannot assign an interest in Westmoreland's tax, particularly retroactively in the absence of a valid, functioning gross proceeds tax of the Tribe. The defendants submit that movants cannot create jurisdiction in this Court by such agreement with each other. Since the Tribe seeks to assert remedies available only to Westmoreland, and Westmoreland, in turn, must rely on the Tribe's rights to avoid the bar of §1341[1], Defendants submit that neither the Tribe, the United States, or Westmoreland, has standing to invoke the jurisdiction of this Court under the present Motions.

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[1] It is plain that Westmoreland's claim for relief in this case is based on its assertion of the rights of others, namely, the Crow Tribe. Westmoreland has never asserted that the taxes it challenges here violate Westmoreland's legal rights and it, therefore, should not be entitled to relief. *Warth v. Seldin*, 422 U.S. 490, 509 (1975).

The plain, statutory language of the Tax Injunction Act generally prohibits Federal District Courts from interfering with the collection and disbursement of State taxes. And it is important to consider the policy behind this Tax Injunction Act because Defendants submit that it is particularly relevant in this situation, and should be controlling despite 28 U.S.C. §1362. This policy of leaving the States, and their political subdivisions, such as Big Horn County and the Big Horn County school system, free to collect their taxes without undue interference from the Federal Courts, has been enunciated in numerous Court cases, including the recent case of *Assiniboine Sioux and Sioux Tribes v. State of Montana*, 568 F. Supp. 269 (1983). In the *Assiniboine and Sioux Tribes* case, the Court stated at p. 279:

> "The individual plaintiffs have attempted to persuade this Court that their claims somehow evade the restrictions of the Tax Injunction Act. In rejecting the invitation to expand the obviously limited jurisdiction of this Court, the necessity that state and local governments be permitted to assess and collect taxes with a minimum of federal interference weighs heavily on this court's mind. See, *Perez v. Ledesma*, 401 U.S. 82, 127-129 n.17, 91 S.Ct.674, 698-699 n.17, 27 L.Ed.2d 701 (Brennan, J. concurring and dissenting). This is especially true in this age where local governments, and indeed governments at all levels, face fiscal ruination at every turn."

See also *Dillon v. Montana*, 634 F.2d 463, 466 9th Cir.(1980); *Mandel v. Hutchinson*, 336 F.Supp. 772, 779 (C.D. Cal. 1971), Aff'd. 494 F.2d 364, 366 (9th Cir. 1974). Defendants

submit that his policy of allowing States and their political subdivisions to collect their taxes without undue interference from the Federal Courts, is particularly poignant in this case, in view of the fact that the gross proceeds tax and its collection and disbursement is so complicated, and any disruption of it, particularly at this time, would create particular problems for the State and its local subdivisions.

The policies enunciated in 28 U.S.C. § 1341, which provide that a District Court should not enjoin a tax under State law where a plain, speedy and efficient remedy may be had in State Court, is particularly applicable here where Westmoreland has adequate remedies to challenge the gross proceeds tax. Montana law provides a speedy and adequate remedy to the taxpayer Westmoreland to challenge the gross proceeds tax, or recover its payment in the event that the gross proceeds tax is declared invalid. The provisions for protest under State law, are designed to provide an adequate and speedy remedy, not only for the taxpayer, but makes it easier for the State and local government to operate and adjust than does a deposit under Rule 67 of the F.R. Civ. P. However, Westmoreland, rather than choosing to pay the gross proceeds under protest and file an action in State Court, has apparently chosen to support the present Motions, which, as noted, because they come so late and seek to interrupt the final payment in the current fiscal year, which is almost over with, the difficulties and chaos that a deposit by this Court would create, causes more severe problems to the governmental entities. As noted in the general explanation of the County's budget revenue and

the expenditure process noted at the outset of this memorandum, under Rule 67 of the F. R. Civ. P. if Westmoreland's tax payment is deposited, it would still be considered part of the County's "taxable value", upon which the budget process would be structured. This means that the County would or has budgeted as if the County would receive Westmoreland's tax payment, but, in reality, the County would simply not have the funds to meet expenditures already made or needed to be made. If the Court were to disregard the policy behind the Tax Injunction Act and allow an interruption of the complicated County tax process with a deposit into Court of Westmoreland's gross proceeds tax, it would be tantamount or necessary for the Court to Order that contrary to State law, Westmoreland's gross proceeds tax should not be included in the "taxable value" of the County in order for the County to readjust its taxation and budget process and raise additional revenues to meet necessary expenditures. Obviously, the gross proceeds tax and the County budget and expenditure process presents greater logistic difficulties than the severance tax payment to the governmental entities involved. Unlike this Court's conclusion on page 3 of its January 6, 1983, Order, depositing the severance tax, the timing, payment schedule, and process involved with the gross proceeds tax does present logistic difficulties. And not only would the logistic difficulties be incurred upon an Order depositing the gross proceeds tax in escrow, but such logistic difficulties would be compounded, in the event that the Court were subsequently to find that the gross proceeds tax is valid, and the County would be faced with somehow refunding

amounts they may have collected to compensate for any amount previously deposited in Court.

Finally, the movants ask that the gross proceeds tax payments "due in the future", pending outcome of this case, be deposited. It is unclear to the Defendants how Westmoreland calculated the present gross proceeds tax attributable to coal mined under lease from the Crow Tribe on the ceded area, and not mined under lease with the State on the State section. It is also unclear how that amount may be determined in the future if the County had to change its taxable valuation as a result of the Court's Order to deposit Westmoreland's gross proceeds tax. This raises a further question of whether the amount sought to be deposited is really an amount certain as required under Rule 67 of the Federal Rules of Civil Procedure.

IV.

TESTS THIS COURT MUST APPLY IN DETERMINING WHETHER A PRELIMINARY INJUNCTION SHOULD BE GRANTED

As a practical matter, a deposit of the gross proceeds tax in Court, pursuant to Rule 67, has the same effect as an injunction and, therefore, the factors considered in determining whether an injunction should be issued are also relevant to the Motion under Rule 67. There are basically two tests which have been laid out by the Courts in determining whether a preliminary injunction should be granted. This Court, in *Kelly v. Gilbert*, 437 F. Supp. 210, 204 (D. Mont. 1976), set forth four requirements:

(1) A reasonable probability of success on the merits;

(2) Irreparable injury for which there is no adequate legal remedy;

(3) Others will not suffer serious adverse affects as a consequence of the preliminary injunction;

(4) ***The effect of the requested Order on the public interest.

An alternative test, which this Court previously followed, was enunciated in *William Inglis & Sons Baking Company v. ITT Continental Baking Company*, 526 F.2d 86 (9th Cir. 1975). The Court in the *William Inglis & Sons Baking Company* case stated:

> "One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibilities of irreparable injury or serious questions are raised and the balance of hardships tip sharply in his favor."

In applying these tests to the Motions now before the Court and the factual situation presented by the possibility of a deposit of Westmoreland's May 31, 1984, gross proceeds tax payment, it is clear that that movants do not meet the requirements under these tests for a deposit or a preliminary injunction. The defendants submit that the Tribe has plainly fallen far short of its burden of proof regarding the gross proceeds tax.

The Defendants submit, without waiving any of their past or future arguments with regard to the severance tax

and without going into the detail that will be in Defendant's trial Brief that there are several reasons and significant differences between the deposit of the severance tax in January of 1973, and the current request to deposit the gross proceeds tax. These reasons and differences help make it more difficult for the movants here to show even a fair chance of success on the merits or that there are serious questions raised, and more difficult for the movants to show that the balance of hardships are tipped sharply in their favor.

It may be helpful to briefly review some of the previous statements of the 9th Circuit and this Court in this case, and then note some of the differences presented by the present situation and the gross proceeds tax. Even the decision of the 9th Circuit remanding this case with much dicta, suggests that there is a difference in the gross proceeds tax and the severance tax. As noted by the 9th Circuit at 650 F.2d 1115:

> "As for the gross proceeds from coal tax, the record is insufficient at this stage of the proceedings to reveal what State, Tribal, and Federal interests may be involved or indicate whether the taxes impact is sufficient to thwart the policies of the 1938 Act."

The decision of the 9th Circuit in this case also stated that the Tribe must show that the taxes *substantially* affect its ability to offer governmental services and to show that the tax is unreasonable. *Crow Tribe v. State of Montana*, 650 F.2d 1115-1116 (1981).

This Court, in its January 6, 1983, Order, stated that under the 9th Circuit's opinion,

> "If the facts are as alleged by the Tribe, *and* the balance of interests of the Tribe outweigh the State, *and* the off-reservation nature of the coal is somehow mitigated, then the Tribe may prevail." *Order* at Page 4 (emphasis added).

If the 9th Circuit believed that the record as to the gross proceeds tax was insufficient before trial to indicate whether the gross proceeds tax thwarted the policies of the 1938 Act, clearly the record after trial shows the gross proceeds tax has little impact, and is in fact a reasonable tax on the part of the County.

There is no evidence that the gross proceeds tax, has had any depressant effect whatsoever on tribal revenues or the Tribe's ability to market coal. The gross proceeds tax, as a percentage of the delivered price of coal, is minuscule. Dr. Dunbar's testimony, at Page 584-87 of the Transcript, like all of the Tribe's expert economic testimony, is clearly hypothetical. It suggests only that if the Tribe levies a tax at a rate so as to maximize its revenues, the gross proceeds tax would be an impediment. This speculation is not proof of the impact of the gross proceeds tax because the Tribe's authority to tax Westmoreland at *any rate* has not been approved by the Department of Interior, and because there is no evidence that the Tribe would be likely to legislate in the manner suggested by Dr. Dunbar if the Department would approve. There is no evidence in the record to suggest that in the absence of the County's gross proceeds tax, the Tribe would have imposed their own gross proceeds tax on Westmoreland or received any additional revenue from Westmoreland in the absence of the State's taxes. Even under the dicta enumerated by the 9th Circuit in this case, there should

be no serious question as to the validity of the gross proceeds tax.

The more serious questions raised by the prospect of a deposit of the gross proceeds tax, are those questions raised regarding the difficulties and inequities resulting to the County as a result of the requested deposit. As will be shown more fully in the Defendants' Trial Brief, the "particularized inquiry" into the State, Federal and Tribal interests at stake in regard to Westmoreland's mine will clearly show that the balance favors the State. Finally, the Tribe has completely failed in its burden of "mitigating the off-reservation nature of the coal".

In considering whether the Court should deposit the gross proceeds tax in light of these previous statements of the 9th Circuit and this Court, some of the differences presented by the request to deposit the gross proceeds tax at this time, and the request to deposit the severance tax in November, 1982 should be noted.

First, the amount of the gross proceeds tax to be deposited now is approximately $715,000.00, compared to quarterly severance tax payments of approximately $2.6 million. Assuming that his Court may possibility [sic] make its decision in this case in the fall of 1984, it could mean that this one gross proceeds tax payment of $715,000.00 would be the only gross proceeds tax involved, whereas, since January of 1983, there may be seven severance tax payments involved, which, at approximately $2.5 million per payment, equals $17.5 million, compared to $715,000.00

Second, all of the gross proceeds tax is used in the County, unlike the severance tax.

Third, the gross proceeds tax makes up a substantial portion of the County budget, unlike the severance tax which is a much smaller percentage of the State budget, as noted on page 3 of this Court's January 6, 1983 Order regarding the severance tax.

Fourth, as noted above, the County budget process has already been set and it included, and is relying upon receipt of, Westmoreland's May 31, 1984 gross proceeds tax, unlike the State which did not include Westmoreland's severance tax payments in preparation of the State's budget in early 1983. And as noted above, and evidenced in the attached memorandums, the Counties have in fact already spent, or are committed to spend, the money, which includes Westmoreland's May 31, 1984 tax payment.

While Defendants believe that on this record there is no serious question as to the validity of the gross proceeds tax, Defendants also submit that the present Motions fail on the second prong of the test enunciated in *Inglis*, and the test enunciated in *Kelley v. Gilbert*, *supra*, which involve the balancing of hardships to the Plaintiffs, Defendants, and the public.

The movant's arguments regarding the balance of hardships are more smoke than substance. The basic premise of the movant's argument to deposit the gross proceeds tax at this time is that the Court must intervene to create a fund from which the gross proceeds taxes may be refunded in the event the tax is invalidated. Movants assert that the tax payments are "difficult or perhaps impossible to trace". This is simply false. Montana law

provides any number of remedies under which a taxpayer may recover an illegally collected tax. The primary remedy available is to pay the tax under protest.[2] Section 15-1-402, M.C.A., allows a taxpayer to pay disputed tax under protest, and following exhaustion of administrative remedies, to sue to a refund in State Court if necessary. Contrary to the movants' assertion, these funds are not "difficult or perhaps impossible to trace." Given the availability of this and other State remedies[3], the movants' assertion that intervention by this Court is necessary to prevent substantial hardship to the movants rings false. Moreover, if the movants were to follow these procedures provided by State law, Defendants submit that the difficulties, inconveniences, and time involved would be less that deposit of the gross proceeds tax under the Motions here.

On the other hand, the hardships to the County and the citizens of Big Horn County are substantial, if the gross proceeds tax, particularly the payment due by June

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[2] Westmoreland is intimately familiar with this process. As a Plaintiff in *Commonwealth Edison v. Montana* 453 U.S. 609 (1981), Westmoreland paid its severance tax under protest during the pendency of that litigation to achieve precisely the results sought in the present motion. Westmoreland, at least, can hardly be heard to assert that there is no other adequate remedy.

[3] Section 15-1-406, M.C.A., allows the taxpayer to file a declaratory action as to an alternative to the administrative remedy for protest payments. Section 15-16-601, M.C.A., provides a further administrative remedy under which the taxpayer may file a claim with the County Commissioners for referral of taxes illegally collected by the County within ten years after the taxes are paid.

1, 1984, is deposited in Court at this time, the problems and hardships are substantial.

Again, one must look at some of the basic facts in order to proceed to balance the hardships of the parties. First, the gross proceeds tax is used entirely in Big Horn County, unlike the severance tax, and has and will benefit Westmoreland, Indians and Non-Indians in the County. The population trend of Big Horn County indicates that the population in Big Horn County increasingly Indian and currently is approximately 50% Indian and 50% non-Indian. Second, the gross proceeds tax makes up a substantial part of the County's budget, unlike the fractional percentage of the severance tax to Montana's State budget, as noted on Page 3 of this Court's January 6, 1983, Order to deposit the severance tax. Westmoreland's gross proceeds tax is used for numerous and various services in Big Horn County, and, as noted in the attached Affidavits of Big Horn County officials, Westmoreland's gross proceeds tax makes up a large percentage of the revenues for these services. Third, the record in this case clearly demonstrated that the County and State provide almost entirely all past, present, and future services on the ceded area. With some of these facts in mind, a discussion of the balance of hardships presented by a possible deposit of the gross proceeds tax at his [sic] time, shows that the equities tip sharply in favor of the Defendants.

As noted at the outset, there is in place a fairly complicated and orderly procedure for counties to budget for services and proceed to collect revenues to provide those services. And that county budget process starts on or before June 1 of each year with the county officials estimating their expenditures for the forthcoming fiscal

year. The budget is subsequently set based on these June estimates, and expenditures throughout the fiscal year, which runs from July 1 to the end of June, proceeds, based upon that budget and revenue expectations. A copy of a county budget calendar outlining this process is part of the Affidavit of Joyce Lippert attached hereto and made a part hereof. What this means is that Big Horn County, beginning in June of 1983, proceeded to project their expenditures and revenue receipts and they did so on the basis that the gross proceeds tax payments from Westmoreland's mine on the ceded area would make up a large part of the revenues to provide those services in the fiscal year running from July 1, 1983, through June 30, 1984. And, the officials of Big Horn County have proceeded to make expenditures on the basis that they would be receiving the second half payment from Westmoreland in May of 1984. What this means is that the movants' Motion at his [sic] time to have Westmoreland's gross proceeds tax payment, starting with its second payment due May 31, 1984, into escrow could not have come at a worse time. As noted in the attached Affidavits of Big Horn County officials, much of the money, including Westmoreland's gross proceeds tax payment is due on or before May 31, 1983, has already, in fact, been spent. And, typically, there are other substantial expenditures of the County and County schools, which are scheduled in June of 1984. As noted in the attached Affidavit of Roberta Snively, and Rod Svee, the impact on schools in Big Horn County, which would result if the May 31, 1984, gross proceeds tax payment of Westmoreland is deposited, are particularly severe.

As suggested in the general explanation of the budget and revenue process of Big Horn County at the outset of this Memorandum, the remedies to the County try to soften the blow of having Westmoreland's gross proceeds tax payment deposited at this time, are very limited. Not only has much of that money already been spent, but there are statutory restrictions on the County's ability to transfer money from other funds to meet those expenditures. And, as explained in the Affidavit of Joyce Lippert, attached hereto and made a part hereof, the County's reserves also do not provide an adequate answer to the problems that would be presented if the County does not timely receive Westmoreland's May 31, 1984, gross proceeds tax payment.

As also noted at the outset of this Memorandum, the County tax system is based on a concept of "taxable valuation" and Westmoreland's gross proceeds tax, was considered as part of the "taxable valuation" of Big Horn County, when the County prepared its County budget for its fiscal year which ends June 30, 1984. Westmoreland's gross proceeds tax will continue to be considered part of Big Horn County's "taxable valuation", even if Westmoreland's gross proceeds tax is deposited into escrow. Unless an Order from this Court ordering a deposit of Westmoreland's gross proceeds tax in Court, would somehow override the Montana Statute providing that the Westmoreland "gross proceeds" are part of the "taxable valuation" of Big Horn County, could Big Horn County then proceed to try to raise revenues on a realistic "taxable valuation" of Big Horn County.

If Big Horn County does not receive Westmoreland's gross proceeds tax, Big Horn County would somehow

have to increase the millage rates to receive greater revenues in order to meet the shortfalls and future budgeted expenditures. This would have to be done by either grossly over-inflating their future budgets, or somehow eliminating Westmoreland's gross proceeds tax from the "taxable valuation" of Big Horn County.

In any event, the end result to the County and to the general public would be that the other taxpayers of Big Horn County would have to pick up a larger share of the revenue needs for the County's budget in order to provide County services, including schools. Clearly, the effect of the requested Order on the public interest, would be that other taxpayers in Big Horn County would end up paying the taxes to fill the void left by the deposit of Westmoreland's gross proceeds tax. What this would mean to the general public of Big Horn County is that while Westmoreland would be paying fewer taxes, and much of the Indians' property is exempt from County property taxes, the Indians and Westmoreland would continue to take advantage of County facilities, some of which were paid for by other citizens long before Westmoreland arrived, and would continue to receive County services. This leads to the other consideration of the Court for a preliminary injunction and that is the question of success on the merits.

As noted in the decision of the 9th Circuit, ultimately, the validity of a State tax where the conduct of non-Indians on the Reservation is involved depends upon a "particularized inquiry into the nature of State, Federal and Tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of State authority would violate Federal law." *White Mountain*

Apache Tribe v. Bracker, 448 U.S. 149, 100 Sup.Ct. 2586. As noted above, the dicta of the 9th Circuit suggested no presumptive conclusion with regard to the gross proceeds tax noting at page 1115,

> "As for the gross proceeds tax from coal tax, the record is insufficient at this stage of the proceeding to reveal what State, Tribal, and Federal interests may be involved, or to indicate whether the tax's impact is sufficient to thwart the policies of the 1938 Act."

As noted in the decision of the 9th Circuit, the Tribe must show that taxes substantially affect its ability to offer governmental services or its ability to regulate the development of Tribal resources, and that the balance of State and Tribal interests renders the State's assertion of taxing authority unreasonable. *Crow* (650 F.2d 1117 [sic] 1971).

All of the gross proceeds tax is expended in Big Horn County, and the population of Big Horn County is approximately 50% Indian and 50% non-Indian. And the Tribe has no gross proceeds tax which has been approved, especially as it would relate the ceded area. Nor does the Tribe provide any services to the ceded area or to Westmoreland or to Big Horn County. Without going into all of the facts and arguments on the merits of the gross proceeds tax, which will be addressed more fully in Defendant's post trial Brief, Defendants submit that the particularized inquiry into the gross proceeds tax reveals that the interests of the County in imposing that tax far outweigh any impacts of that tax on the ability of the Crow Tribe to regulate themselves. One of the biggest complaints of the non-Indian citizens of Big Horn County

is that the Indians do not pay certain property taxes, yet they demand equal services as other citizens of Big Horn County, and Defendants submit that any Federal payments in lieu of taxes are inadequate to meet all of those County services. Defendants submit that a particularized inquiry into the State, Tribal and Federal interests at stake with regard to the gross proceeds tax substantiates its validity. A deposit of Westmoreland's gross proceeds tax at this time not only would cause an administrative nightmare, but is unwarranted on the particularized inquiry on the merits.

RESPECTFULLY SUBMITTED THIS 30th day of April, 1984.

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ATTORNEYS FOR DEFENDANTS,
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiffs, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, -v- THE STATE OF MONTANA, Defendants, and WESTMORELAND RESOURCES, Defendant-Intervenor.	)	NO. CV-78-110-BLG **DEFENDANTS' POST-HEARING MEMORANDUM IN OPPOSITION TO MOTION TO DEPOSIT AND MOTION FOR A PRELIMINARY INJUNCTION**

I.

INTRODUCTION

Defendants file this Memorandum in response to Plaintiffs' and Plaintiff-Intervenor's May 18, 1984, Post-Hearing Memorandum filed in support of their Motion to Deposit and their Motion for Preliminary Injunction. Defendants believe that Plaintiffs and Plaintiff-Intervenor's Memorandum – (1) reflects a continued misunderstanding of the County budget process, and (2) glosses over or ignores actual impacts to the County and County Schools, which would result from a deposit of Westmoreland's gross proceeds payment, commencing May 31, 1984, and (3) misconstrues Defendants' argument regarding short and long-term impacts of such a deposit. On the other hand, Plaintiffs and Plaintiff-Intervenor's Memorandum says nothing about possible impacts to the Tribe in the event that the gross proceeds tax is not deposited and an injunction is not issued. This Memorandum of Defendants will briefly address each of these points.

II.

ARGUMENT

A. PLAINTIFF AND PLAINTIFF-INTERVENOR MISCONSTRUE OR DO NOT UNDERSTAND THE COUNTY BUDGET PROCESS

First, it is clear that Plaintiffs and Plaintiff-Intervenor still do not understand the meaning of "reserves" or "surpluses", as they are intended and exist in the County and school budgets. "Reserves" are defined in the budgets as the amount of money necessary to fund budgeted

expenditures from July 1 until additional tax collections are received in November. The reserves are *not* available to meet shortfalls or to compensate for non-receipt of taxes in the last part of the year. Using these "reserves", or "surpluses" to compensate for non-receipt of Westmoreland's tax payment rather than using them to fund their budgeted purpose for the remaining part of the year, would be like robbing Peter to pay Paul. Plaintiffs suggest that *some* transfers can be made among funds, but as Defendants have previously pointed out, there are statutory restrictions, or outright prohibitions, on transfers among funds. Because the "reserves" have already been budgeted to meet necessary and planned expenditures from June to November, 1984, the fact is that non-receipt of Westmoreland's May 31, 1984, tax payment, which had been built into the current budget, would cause some shortfalls and difficulties for the County.

B. THE FACT IS NON-RECEIPT OF WESTMORELAND'S GROSS PROCEEDS PAYMENT, COMMENCING MAY 31, 1984, WOULD RESULT IN BUDGET SHORTFALLS AND CAUSE PARTICULAR HARDSHIPS

Defendants submit that the statements in the Defendants' Affidavits and testimony – that there would be impacts and difficulties to the County and County Schools as a result of depositing Westmoreland's gross proceeds tax payment, commencing with the May 31, 1984, payment – are essentially uncontroverted. It was not the intent of the Defendants to offer any different information at the May 15, 1984, hearing, from that in the Defendants' Brief and Affidavit submitted on April 30,

1984. Rather, the testimony at the hearing was intended to illustrate the general problem of budget shortfalls and difficulties to the County and County Schools in the event that Westmoreland's gross proceeds tax payment is deposited commencing May 31, 1984. As an illustration of a particular hardship resulting from deposit of Westmoreland's tax, Joyce Lippert's testimony presented the example of the impact of such deposit on the hospital remodeling project. Lippert noted that the hospital, which is a benefit to all citizens of Big Horn County including Plaintiff Crow Tribe members is in the final stages of a major remodeling and that the "reserves" in the Hospital account, were budgeted in August of 1983, to meet certain expenditures to be made from June, 1984, to November, 1984, in order to complete that hospital remodeling project. She noted that the contractor has been on the hospital site for sometime and must be paid, and that equipment for the remodeling has been ordered and must be paid. There is no "surplus" in this hospital account, as shown in Defendants' Exhibit 501. Without receipt of Westmoreland's May 31, 1984, tax payment, the funds in this hospital remodeling fund will be inadequate to meet expenditures which have already been made or budgeted between now and November, 1984, and at this late date it is not possible or at least not rational to defer expenditures and not complete the hospital remodeling.

Lippert's testimony is – that such shortfalls and difficulties associated with completion of the hospital remodeling project, in the event of non-receipt of Westmoreland's May 31, 1984, gross proceeds tax payment are illustrative of other budgeted funds in the County.

Secondly, the testimony of Roberta Snively, was that there would be an approximately 6% shortfall in the County School budgets in the event that Westmoreland's May of 1984 tax payment is escrowed. Snively also pointed out that by statute, certain School accounts cannot and do not have any cash reserves. Even the Plaintiffs, on page 5 of their Post-Hearing Memorandum, note that there are two accounts, elementary tuition and elementary debt service, that have no cash reserves or surpluses. But, Plaintiffs fail to note that the high school debt service is also a fund without cash reserves. More importantly, Plaintiffs casually suggest that "The School Board or County Commissioners surely have sufficient flexibility to devise a remedy for these two minor shortfalls". (Plaintiffs' Memorandum, page 5). Plaintiffs do not quote any section of the law that could remedy such shortfalls and the witness, Snively, is not aware of any procedure that could address this shortfall. Defendants submit that it is not proper to characterize these shortfalls as "... minor shortfalls.", because, for example, the elementary and high school debt service was budgeted to meet bond payments, which bond payments must be made when such payments are due or the county schools will be in default. These problems and shortfalls are illustrative of the short-term problems that would result to the County and County Schools, in the event that Westmoreland's May 31, 1984, tax payment is not received on May 31, 1984.

As previously noted, these short-term problems associated with the county budget process and the gross proceeds tax are different from the situation presented by a deposit of the severance tax and the State budgetary

process because the County expenditures budgeted in August of 1983 for expenditures through November of 1984, were done on the basis that Westmoreland's gross proceeds makes up part of the "taxable value", under Montana law, and will remain part of that "taxable value", until and if determined otherwise, and, therefore, the County is planning on receipt of Westmoreland's May 31, 1984, tax payment to meet its obligations through November of 1984. The status quo is that Westmoreland is still a taxpayer, and an agreement between Westmoreland and the Tribe, or a preliminary injunction, should not disrupt that status quo, particularly when Defendants believe that the Plaintiffs have not shown that they will prevail on the merits.

It is true that the short-term problems received the initial emphasis of the Defendants and it is still Defendants' position that these short-term problems exist and are not easily met. Defendants submit that the assertions in the testimony and Affidavits supporting the short-term problems are still uncontroverted. However, in addition to the short-term impacts, Defendants pointed out at the hearing on May 15, 1984, that the short-term problems could get worse as time goes on in the event of a deposit of the funds, which argument of Defendants was intended in no way to diminish the impact of the short-term problems.

C. DEFENDANTS MISINTERPRET THE COUNTY'S ARGUMENT REGARDING LONG-TERM PROBLEMS.

On page 6 of the Plaintiff and Plaintiff-Intervenor's Post-Hearing Memorandum, Plaintiff and Plaintiff-Intervenor suggest the County's argument has come full circle, and they incorrectly state "that the County, in its closing argument, conceded that the short-term problems were easily met, and, instead, the County now argues that it is the long-term problems that dictate the motions be denied". That interpretation by the Plaintiffs and Plaintiff-Intervenor is just plain wrong. As noted above, the Defendants and the Defendants' witnesses have established that in the event that Westmoreland's May 31, 1984, tax payment is not received. There will, in fact, be short-term shortfalls and difficulties between now and November, 1984. However, the Defendants, believing that the short-term impacts were established and uncontroverted, also pointed out that there may well be long-term impacts from a deposit of Westmoreland's gross proceeds tax, based on the premise that the Plaintiffs' Motion to Deposit covers all future gross proceeds tax payments. In the event that this litigation continues for some time, the situation caused by such a deposit would become worse as time goes on. The long-term logistic difficulties to the County could be substantial. Westmoreland's gross proceeds tax would still be considered part of the County's "taxable value", and it would be difficult for the County to raise additional revenues to meet necessary expenditures. The County may clearly be without necessary funds for an effective government. In the event that the County could somehow raise additional revenues

from other taxpayers besides Westmoreland, the Defendants were to ultimately prevail and the gross proceeds tax is sustained, the County may face the expensive and confusing process of refunds to other taxpayers who made up the shortfalls caused by Westmoreland's deposit.

While Defendants misinterpret or try to gloss over the short and long-term impacts of a deposit to the County, they say nothing in their Post-Hearing Memorandum about the hardships to the Tribe in the event their Motions are denied, and ignore the statutory provisions to protect their interests.

D. THE PLAINTIFFS AND PLAINTIFF-INTERVENOR HAVE NOT SHOWN ANY SUBSTANTIAL HARDSHIP OR SERIOUS QUESTIONS RAISED BY PAYMENT OF WESTMORELAND'S GROSS PROCEEDS TAX PAYMENT TO THE COUNTY.

As noted at the hearing on May 15, 1984, the Plaintiffs and Plaintiff-Intervenor, have merely stated that "once Westmoreland pays the disputed taxes to the County, they become more difficult to recover." (Plaintiffs' Reply Memorandum, page 9, May 8, 1984). The Plaintiffs make *no* argument in their Post-Hearing Memorandum with regard to such alleged difficulties to the Plaintiffs or Plaintiff-Intervenor in the event Westmoreland's tax is not deposited. Furthermore, the Plaintiff and Plaintiff-Intervenor, which has the burden of proof to support their Motions, presented no witnesses, and only presented one short unsigned Affidavit of Joe Presley, President of Westmoreland, in conjunction with their

original Motions and Memorandums, and did not even tender Presley for cross-examination. Defendant submits that the Plaintiff and Plaintiff-Intervenor have not shown that they will prevail on the merits and have not raised any serious questions or shown substantial harm to them in the event that Westmoreland's gross proceeds tax is not deposited.

Finally, Defendants submit that Plaintiffs have completely ignored the Defendants' position that the County is good for any lawful final Judgment issued against it and can pay such Judgment without the necessity of a deposit of Westmoreland's gross proceeds tax. Section 2-9-316 M.C.A. allows the political subdivisions of the State, including the County and School governments, to satisfy any lawful final Judgment out of funds from specified sources and in specified ways. This statutory provision allows the County to proceed in a more orderly fashion to meet its obligations, and also provides a means for the County to satisfy any lawful final Judgment issued against it, which Defendants submit makes a deposit of Westmoreland's gross proceeds tax unnecessary.

Respectfully submitted this 24th day of May, 1984.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, -vs- THE STATE OF MONTANA, et al., Defendants, and WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	CV-78-110-BLG ORDER (Filed May 25, 1984)

Pursuant to a forthcoming Memorandum Opinion,

IT IS ORDERED that the plaintiffs' motions for preliminary injunction and leave to deposit funds into the Court are denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 25th day of May, 1984.

/s/ James F. Battin
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, -vs- THE STATE OF MONTANA, et al., Defendants, and WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	)	CV-78-110-BLG MEMORANDUM OPINION (Filed Jun. 22, 1984)

Plaintiff Crow Tribe and plaintiff-intervenor United States move for a preliminary injunction enjoining the State of Montana and Big Horn County from enforcing or collecting the State's gross proceeds tax on coal produced under a lease between the Tribe and Westmoreland Resources. Plaintiff, plaintiff-intervenor and Westmoreland move for leave to deposit into the Court's Registry sums representing these tax payments. These motions are directed at both a $715,728.33 tax payment due May 31, 1984, and all other gross proceeds tax payments that may

become due during the pendency of this litigation. Because of the time constraints accompanying the request for a preliminary injunction, the Court issued an order responding to these motions on May 25, 1984. Both motions were denied for the reasons set forth below.

The relief that movants seek with respect to the gross proceed tax is similar to the relief previously ordered with respect to the Montana Coal Severance Tax. On January 6, 1983, the Court issued an injunction against the collection of the severance tax and allowed Westmoreland to pay the equivalent of the severance tax payments into the Court's Registry. The Court premised its jurisdiction on 28 U.S.C. § 1362 and found that the Tax Injunction Act, 28 U.S.C. § 1341, was not a jurisdictional bar. The Court perceived that the difficulties the Tribe might encounter in recovering the severance tax, should judgment be entered in the Tribe's favor, would outweigh any hardship the State would endure if the tax, which represented only a small fraction of the State's general fund, was deposited into the Court's Registry.

In spite of the similarities in the relief requested, there is reason to treat the gross proceeds tax differently from the severance tax. Unlike severance tax revenues, gross proceeds tax revenues are used entirely at the county level, and in the coal-producing counties these revenues may comprise a significant percentage of the county budget. While the gross proceeds tax totals a substantial sum, it pales in comparison to the severance tax and therefore is less likely to be found to thwart the policies of the Mineral Leasing Act of 1938. 25 U.S.C. §§ 396a-396g. Further, the apparent legislative intent surrounding the severance tax is more likely to conflict with

the Mineral Leasing Act's purposes than does the legislative intent behind the enactment of the gross proceeds tax. *See Crow Tribe v. State of Montana*, 650 F.2d 1104, 1113-15 (9th Cir. 1981). The critical element, however, in determining whether injunctive relief is appropriate is the relative hardships to the parties. These hardships balance differently with respect to the gross proceeds tax than they did when the Court considered the severance tax in January 1983.

Before a moving party may obtain a preliminary injunction it "must demonstrate *either* a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." *Beltran v. Myers*, 677 F.2d 1317, 1320 (9th Cir. 1982) (emphasis in original). Even though all evidence in this case has been presented by the parties at trial, the Court is not bound at this preliminary injunction stage to decide the merits of this complex case. *See Dymo Industries, Inc. v. Tapewriter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). The Court is neither prepared nor willing to state before the case has been submitted after final arguments on July 31, 1984, that plaintiffs have a probability of success on the merits, but there is no doubt that plaintiffs have raised serious questions concerning both the severance and gross proceeds taxes. The balance of hardships, however, does not tip sharply in the moving parties' favor.

Plaintiffs' principal contention is they will incur hardships in recovering a judgment, should plaintiffs ultimately prevail on the merits, if Westmoreland pays the gross proceeds to Big Horn County. Plaintiffs wish to

create a fund in the Court's Registry to which they can conveniently look for satisfaction of a judgment. The grounds for plaintiffs' hardship claims are not clear, and their fears may be unfounded. The gross proceeds revenues, unlike severance tax revenues, are earmarked and appear to be readily traceable. Further, Mont. Code Ann. 2-9-316 (1983) sets forth an orderly procedure for political subdivisions of the state to satisfy any lawful final judgment.

The hardships occasioned upon defendants by the granting of an injunction would be considerable. Affidavits of Big Horn County officials indicate that withholding Westmoreland's gross proceeds payments may cause both short and long term disruption in Big Horn County's government and school districts. The revenues received from Westmoreland are utilized primarily at the local level and constitute a significant portion of the county's total revenues. Plaintiffs argue that the county can cover the shortfall caused by payment of the gross proceeds tax into the Court's Registry with reserves and other surplus funds. This argument derives from an oversimplification of the county's administrative and fiscal responsibilities and an underestimation of the considerable practical and legal difficulties attendant to overcoming the budgetary constraints imposed by state law. Further, even if an injunction issued and the funds were deposited into the Court, it appears that the county must continue to treat Westmoreland's gross proceeds as part of the taxable valuation. This factor could contribute to a long-term hardship on Big Horn County.

Because the brunt of the hardships falls on defendants, the Court, applying the guidelines of this Circuit,

concludes that injunctive relief is inappropriate. Plaintiffs and the taxpayer, Westmoreland, are free to pursue any administrative or judicial remedies that may be available at the state level.

An order conforming to this memorandum opinion was issued on May 25, 1984.

Done and dated this 22nd day of June, 1984.

/s/ James F. Battin
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS,

Plaintiff,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

-vs-

THE STATE OF MONTANA, et al.,

Defendants,

and

WESTMORELAND RESOURCES, INC.,

Defendant-Intervenor.

CV 78-110-BLG-JFB

MEMORANDUM OPINION AND ORDER

(Filed June 9, 1988)

Presently pending before the Court are the Proposed-Intervenors' Motion for Leave to Intervene and Defendant-Intervenor Westmoreland Resources, Inc.'s Motion for Leave to Join Additional Parties. For the reasons stated below, both motions are denied.

FACTS AND PROCEDURAL BACKGROUND

Although the history of this case is well known to counsel and the Court, a brief review is in order at this time.

This case originated as a challenge by the Crow Tribe to the gross proceeds and severance taxes imposed by the State of Montana upon coal mined from the "ceded strip" of land adjacent to the Crow Reservation. Those taxes were imposed by the State in 1975. In 1976, the Tribe imposed its own severance tax on coal mined on the reservation.[1]

In 1978, the Crow Tribe filed the present action challenging the constitutionality of the State of Montana taxes as applied to coal mined on Indian land. The United States of America intervened as a party plaintiff, to protect its interests as trustee of the coal upon which the taxes were levied. Westmoreland, a lessee of the Tribe, intervened as a party defendant and asserted a counterclaim against the Tribe, challenging the tribal tax imposed upon it.

In 1982, Westmoreland and the Tribe entered into an amended lease agreement, wherein Westmoreland agreed to pay the tribal tax, less the amounts of severance and gross proceeds taxes paid to the State of Montana. The amended lease agreement was approved by the Crow Tribal Council, and by the Assistant Secretary of the Interior for Indian Affairs on September 29, 1982.

Beginning in January 1983, Westmoreland paid Montana severance tax payments into the registry of this Court, pending a determination as to the constitutionality

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[1] A similar tribal tax enacted in 1982 for coal mined on the ceded strip was rejected by the Department of Interior because of a disclaimer of tribal jurisdiction contained in the Crow Constitution. *See, Crow Tribe of Indians v. State of Montana*, 819 F.2d 895, 897 (9th Cir. 1987).

of the State taxes. In November 1987, Westmoreland began paying Montana gross proceeds tax payments into the registry as well. On June 11, 1987, the Ninth Circuit Court of Appeals held that "Montana's coal taxes are preempted by federal law and policies" and that "the taxes are void for interfering with tribal self-government." *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895, 903 (9th Cir. 1987). That decision was affirmed by the United States Supreme Court on January 11, 1988. *Crow Tribe of Indians v. State of Montana*, 108 S.Ct. 695 (1988). Now that the question of the State taxes' constitutionality has been resolved, this Court is called upon to determine the proper distribution of the approximately $28 million which has been paid into the registry of the Court by Westmoreland since 1983.

The Crow Tribe claims an entitlement to the funds based on the 1982 Lease Amendment between it and Westmoreland. Competing with the tribe for these funds are various utility customers of Westmoreland Resources.[2] These utility customers seek leave of Court to intervene on the ground that they have shouldered the financial burden of the State taxes, since the taxes were "passed through" to them under a provision in their contracts with Westmoreland. The utilities contend that their interest in the funds is superior to that of the Tribe.

Westmoreland supports the utilities' attempt to intervene, and alternatively requests joinder of the utilities as

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[2] Northern States Power Company, Wisconsin Power and Light Company, Dairyland Power Cooperative, Interstate Power Company, Upper Peninsula Generating Company and Wisconsin Power Company.

parties to the action. Westmoreland does not dispute the Tribe's claim to the funds on its merits, but seeks resolution of the competing claims before release of any funds from the Court's registry, to avoid double liability for any payments made. The State of Montana and the United States of America oppose the Motions for Leave to Intervene and to Join Additional Parties. The State claims no entitlement to the funds in question, and takes no position on their release. The United States supports release of the funds to the Tribe.[3]

DISCUSSION

I. PROPOSED INTERVENOR'S MOTION TO INTERVENE

The utilities have moved for leave to intervene, to protect a claimed interest in funds paid into the registry of the Court by Westmoreland pursuant to the Court orders of January 6, 1983 and November 30, 1987. They allege that invalid Montana severance and gross proceeds taxes paid by Westmoreland were "passed through" to them, as a component of the cost of coal. As such, the utilities argue that they have reimbursed Westmoreland for the tax payments and are entitled to a retroactive

[3] The United States concedes that the funds at issue are owed to the Tribe by virtue of its exercise of governmental authority, and not its status as beneficial owner of the coal, and as such the Department of the Interior has no trust responsibility or authority over the tax receipts. *See*, United States Memorandum in Response to Motions for Release of Funds, to Add Parties, for Intervention, and for Stay of Disbursement of Funds, pg. 3.

price reduction for invalid taxes paid. The utilities claim an interest in the funds currently held by the Court, on the grounds that Westmoreland is apparently financially unable to grant such a price reduction and that the Tribe has no valid entitlement to the fund since it has no valid tax applicable to coal mined on the ceded strip.

A. TIMELINESS

The utilities seek intervention under Rule 24(a) (2) and (b) (2), Fed.R.Civ.P. Under Rule 24(a) (2), anyone with an interest in the subject of an action whose ability to protect that interest may be impaired by the disposition of the action, and whose interest is not adequately represented by other parties, shall be permitted to intervene "upon timely application". Under Rule 24(b)(2), an applicant whose claim or defense has a question of law or fact in common with the main action may be permitted to intervene "upon timely application". The first requirement for intervention under both sections is that application for intervention must be timely.

In determining timeliness, the Ninth Circuit Court of Appeals has stated that it looks to three factors: (1) the stage of the proceedings; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *United States v. State of Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). In applying these factors to the present motion, the Court remains mindful that the timeliness requirement for intervention as a matter of right should be treated more leniently than for permissive intervention because of the likelihood of more serious harm. *Id.* The Court must consider all the circumstances of the case in determining

whether a motion to intervene is timely. *Legal Aid Society of Alameda County v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980). Mere lapse of time is not determinative. *State of Oregon*, 745 F.2d at 552.

This case was filed on July 13, 1978 and has been pending for almost a decade. At issue in the original action was the constitutionality of the State of Montana taxes, as applied to coal mined on the ceded strip. After two appeals to the Ninth Circuit and an appeal to the United States Supreme Court, that issue has been fully and finally resolved. All parties to the original litigation have operated under the assumption that, upon a determination that the State taxes are invalid, the funds held by the Court would be distributed to the Crow Tribe pursuant to the 1982 Lease Amendment. (*See, Crow Tribe v. State of Montana*, No. CV 78-110-BLG, Order of January 6, 1983 at page 5.)

The utilities seek to intervene during this final stage of the proceedings, presenting new and complex issues for resolution by the Court. Resolution of these issues, concerning the validity of the Crow tribal tax and the 1982 Lease Amendment, would inevitably involve another protracted round of litigation. The delay and financial deprivation resulting to the Tribe from additional litigation, combined with the already lengthy period of litigation, militate against granting leave for intervention at this time.

The utilities acknowledge that they have been aware of this litigation and of the 1982 Lease Amendment between Westmoreland and the Crow Tribe for several years. However, they attempt to justify the lengthy

period of non-involvement, claiming that they were not aware that the Amendment would be interpreted to require payments to the Crow Tribe in the absence of a valid tribal tax, and that they did not know until February, 1988 that Westmoreland would not seek to recover the funds held by the Court.

A review of the 1982 Lease Amendment reveals that there was a strong suggestion, if not a likelihood, that these events might occur. Page 1, Paragraph D of the Amendment states that Westmoreland and the Tribe "desire to resolve the dispute between them [concerning the Tribe's power to tax Westmoreland's mining operations] by this Amendment to the Amended Lease." Under Paragraph 4, resort to judicial determination of the tribe's power to impose taxes on Westmoreland is limited to the narrow circumstance that the parties are unable to agree on the amount of taxes to be paid to the Tribe after the State taxes are repealed or reduced. Paragraphs 5 and 6 of the Amendment specifically state that neither Westmoreland nor the Tribe has admitted the Tribe's power, or lack of power, to impose any tax on Westmoreland. A fair reading of the Amendment shows that the legal validity of the tribal tax remained very much a live issue, and that in an attempt to resolve the dispute Westmoreland had agreed to make payments and not raise that issue except in a very limited circumstance. Further, it was clear from Westmoreland's counterclaim against the Tribe that it did not intend to pursue a claim for the funds paid after the date of the Lease Amendment, on its own behalf or that of the utilities. (*See*, Westmoreland's Answer to Plaintiff's Third Amended Complaint, including Counterclaim and Cross-Claim, filed December 23, 1982, pg. 5-6.

It was incumbent upon the utilities, after the 1982 Lease Amendment, to take immediate affirmative steps to protect any interest which they might have in the funds paid by Westmoreland to this Court. The utilities failed to take any steps, although they knew or certainly should have known that their interests might be implicated and might not be adequately represented by Westmoreland. Although February, 1988 may have been the first time that the utilities realized that the end result of the litigation would not be entirely to their liking, the Court finds that they should have recognized the potential effects much sooner, and protected themselves much sooner. This motion to intervene, filed almost six years later, is untimely and must be denied.

Having so concluded, the Court would ordinarily not proceed to consider the additional requirements for intervention under Rule 24. Because of the significance of this decision, the Court wishes to briefly do so.

The Ninth Circuit has adopted a four-part test to determine whether an application under Rule 24(a)(2) should be granted:

(1) the motion must be timely;

(2) the applicant must assert an interest relating to the property or transaction which is the subject of the action;

(3) the applicant must be so situated that without intervention, the disposition may, as a practical matter, impair or impede its ability to protect that interest;

(4) the applicant's interest must be inadequately represented by the existing parties.

County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986). After timeliness, the existence of a sufficient interest is the most crucial prerequisite to intervention.

In this case, it is true that the utilities may have a valid claim against Westmoreland for the State tax payments reimbursed by them. However, they do not have a significant, protectable interest in the particular funds held in the Court's Registry, since they did not actually pay the taxes to the State of Montana. To even begin to show the existence of an interest in these funds, the utilities must defeat the Tribe's interest by demonstrating the invalidity of the tribal taxes and the 1982 Lease Amendment. An attempt to do so would be foreclosed, since the Tribe is an indispensible party to and enjoys sovereign immunity from any such suits. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985); *Lomayaktawa v. Hathaway*, 520 F.2d 1324 (9thCir. 1975); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C.Cir. 1986). Further, the utilities are not parties to the Lease Amendment, and therefore cannot challenge the validity of that document. Any interest, contingent as it is on challenges which are unlikely to succeed, does not form a sufficient basis for intervention in this action.

Nor does the fact that distribution of the funds may decrease the collectability of any judgment eventually obtained by the utilities against Westmoreland give the utilities a sufficient interest to intervene in this action. *See, e.g., Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343, 1346 (9th Cir. 1977); *Jet Trader's Investment Corp. v. Tekair, LTD.*, 89 F.R.D. 560, 570 (D.Del. 1981). "Logically extended [allowing intervention on that basis]

would give the right to intervene . . . to all persons with potential claims against any party in the . . . action . . . on the ground that the outcome of the . . . suit may increase or decrease the collectability of their claims," *Id.*

Last, the utilities have not sufficiently shown that, without intervention, their ability to protect their "interest" is impaired or impeded. Distribution of the funds held by the Court will not, as a practical matter, foreclose any rights of the utilities in a subsequent proceeding. *See, Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977); *County of Orange v. Air California*, 799 F.2d 535, 538-39 (9th Cir. 1986); *c.f., United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986); *Lake Investors Development Group v. Egidi Development Group*, 715 F.2d 1256 (7th Cir. 1983). The inconvenience of having to litigate these new issues separately does not constitute the sort of adverse effect contemplated in the Rule. *Blake*, 554 F.2d at 954. Since the elements for intervention under Rule 24(a)(2) are not present, the Court concludes that intervention under that Section is not proper.

Alternatively, the utilities seek to intervene under Rule 24(b)(2). Under that Section, an applicant may be permitted to intervene "when the applicant's claim or defense and the main action have a question of law or fact in common". In the present action, there are no remaining issues of law or fact to be resolved. Neither Westmoreland nor the State of Montana challenge the merits of the Crow Tribe's claim of entitlement to the funds in the Court's Registry. The United States supports release of the funds to the Tribe. Prior to the filing of the Motion to Intervene, the Court was prepared to distribute the funds to the Tribe. The utilities seek to raise new

issues, hoping to defeat the Tribe's entitlement and prove their own. However, the Court finds that resolution of those new issues is more appropriately had in a separate proceeding against Westmoreland.

The utilities reimbursed Westmoreland for State taxes paid, under the terms of the contracts between the Utilities and Westmoreland. Any refund of sums paid, through price reductions or otherwise, must come from Westmoreland. Westmoreland's obligations to the utilities, if any, are factually and legally distinct from Westmoreland's obligations to the Tribe, under the 1982 Lease Amendment. To allow the utilities to inject new issues into the original action would unnecessarily and improperly muddy the waters and delay the Tribe's receipt of that to which it is entitled. The Court therefore will not exercise its discretion to permit intervention.

II. WESTMORELAND'S MOTION TO JOIN ADDITIONAL PARTIES

Westmoreland seeks joinder of its utility customers as parties to this action, under Rule 19, Fed.R.Civ.P. Joinder is sought to protect Westmoreland from the multiple liability which it believes may occur if the funds held by the Court are distributed prior to judicial resolution of the utilities' claims.

Joinder under Rule 19 involves a two-step analysis. First, the Court "must determine whether the absent party should be joined as a 'necessary party' under subsection (a). Second, if the Court concludes that the nonparty is necessary and cannot be joined for practical or

jurisdictional reasons, it must then determine under subsection (b) whether in 'equity and good conscience' the action should be dismissed because the nonparty is 'indispensable'. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 (9th Cir. 1983).

Subsection (a) of Rule 19 sets forth two categories of parties which should be joined if feasible:

> (1) [if] in the persons absence complete relief cannot be accorded among those already parties; or
>
> (2) [if] the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

Rule 19(a), Fed.R.Civ.P.

Rule 19(a)(1) requires joinder only when the absence of the unjoined party prevents complete relief among the current parties. *LCC Corp. v. Pension Benefit Guaranty Corp.*, 703 F.2d 301, 305 (8th Cir. 1983). The Court can discern no reason why the utilities' absence from this action would preclude complete relief between the Tribe, the United States, Westmoreland and the State of Montana. To the contrary, those parties have already obtained resolution of the issues raised in the original action, and do not contest the merits of the Tribe's claim to the funds.

The utilities are necessary parties, if at all, only under Rule 19(a) (2).

The initial inquiry under this subsection is whether the absent party claims a legally protected interest relating to the subject matter of the action. *Northrop*, 705 F.2d at 1030. As discussed in prior portions of this Memorandum Opinion, while the utilities no doubt have an interest in obtaining a refund from Westmoreland for any amounts wrongfully "passed through" to them under the contracts, the Court does not find any legally protectable interest relating to these particular funds. The Court therefore concludes that the utilities are not necessary parties to this action. Because the Court concludes that the utilities are not necessary parties to this action, it need not determine whether joinder is feasible and, if not, whether their presence would be indispensible.

Even assuming the existence of a sufficient interest to warrant joinder under Rule 19, neither of the remaining elements of joinder are met. The disposition of the original action will not impede or impair the utilities' ability to protect their interests, since the utilities are free to pursue a separate action against Westmoreland to recover amounts wrongfully paid. The Court cannot see any other reason why the utilities will be prejudiced by having to proceed against Westmoreland in a subsequent action.

Nor will disposition of the original action leave any of the original parties "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Westmoreland is a party to two distinct sets of contracts, one with the Tribe (the 1982 Lease Amendment) and the other with

its utility customers. Depending upon the outcome of the issues raised by the utilities, Westmoreland may be able to pass its obligations to the Tribe through to its utility customers. It is also possible that Westmoreland may be liable to *both* the Tribe (under the 1982 Lease Amendment) and the utilities (to refund prior payments wrongfully passed through to them under their contracts.)[4] However, that result would ensue regardless of whether the utilities' claims are aired in this or a subsequent proceeding. The fact that Westmoreland may be liable on both of its contracts, instead of passing its payments to the Tribe through to its customers, does not create the type of inconsistent obligation contemplated in Rule 19. *See, e.g., First National Bank v. Platte Valley Bank*, 107 F.R.D. 120, 122 (D.Colo. 1985).

It is a misapplication of Rule 19(a) to add parties who are not necessary or indispensible, and who have a separate cause of action entirely. *Bakia v. County of Los Angeles*, 687 F.2d 299 (9th Cir. 1982). Since the utilities' claims against Westmoreland arise from different contracts and raise different legal issues from those litigated in the original action, Westmoreland's Motion to Join Additional Parties is denied.[5]

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[4] Copies of the contracts between the utilities and Westmoreland are not before the Court. The Court is thus unable to state with certainty what the result will be if the tribal taxes are eventually determined invalid.

[5] The Court also questions the timeliness of Westmoreland's Motion, for the same reasons as those stated with respect to the utilities' Motion for Leave to Intervene. See pgs. 5-7, supra; *See also, Seay v. McDonnell Douglas Corp.*, 533 F.2d 1126, 1132 (9th Cir. 1976).

CONCLUSION

This Court holds in its registry amounts paid by Westmoreland to the State of Montana, for taxes which were later determined to be unconstitutional. No party to the original action disputes the merits of the Tribe's entitlement to those funds, under the 1982 Lease Amendment, in the absence of valid State taxes. It has been apparent since 1982 that Westmoreland would not dispute its obligation to the Tribe, except in circumstances not relevant here. The Motions for Leave to Intervene and to Join Additional Parties are simply too late. Furthermore, the necessary elements for intervention and/or joinder under the Rules have not been met. The Court appreciates the utilities' effort to avoid all tax liability, thereby protecting the rights of their ratepayers. However, it would be unconscionable to allow them to pursue that effort at the expense of the Crow Tribe.

Based on the foregoing,

IT IS ORDERED that the Proposed-Intervenor's Motion for Leave to Intervene and Westmoreland Resources, Inc.'s Motion to Join Additional Parties be and are hereby denied.

IT IS FURTHER ORDERED that a hearing is set in this matter for June 23, 1988 at 9:00 o'clock a.m., Courtroom I, Federal Building, 316 North 26th Street, Billings, Montana, for the purpose of determining the validity of various liens asserted against the funds held in the Court's registry, and the final amount of funds to be distributed to the Crow Tribe.

The Clerk is directed forthwith to notify counsel for the respective parties and all lienors of record of the making of this order.

Done and dated this 9th day of June, 1988.

/s/ James F. Battin
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, vs. UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. THE STATE OF MONTANA, et al., Defendants, vs. WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	)	CV 78-110-BLG-JFB MEMORANDUM OPINION AND ORDER (Filed July 11, 1988)

Presently pending before the Court is the Motion of Westmoreland Resources, Inc. ("Westmoreland"), to amend its Answer in Opposition to the Crow Tribe's Motion for Release of Funds. The Tribe's Motion seeks an Order directing the Clerk to pay over to the Crow Tribe the Severance and Gross Proceeds Tax Funds which were

paid into the Registry of the Court pursuant to the Court's Orders of January 6, 1983, and November 30, 1987. Westmoreland originally did not challenge the merits of the Tribe's entitlement to the funds in question,[1] but now seeks to alter that position. Westmoreland challenges the validity of the Tribal severance tax as applied to coal mined by it on the Ceded Strip. In addition, Westmoreland has filed a motion for an emergency hearing based on its Amended Answer. For the reasons stated below, the Motion of Westmoreland to amend its Answer is granted, but no hearing is necessary to resolve the contentions made in the Amended Answer.

FACTS AND PROCEDURAL BACKGROUND

Much of the history of this case was reviewed by the Court in its Memorandum, Opinion and Order dated June 9, 1988. That history need not be repeated here. However, the background of events which led to the Amended Lease Agreement in 1982 between Westmoreland and the Tribe requires some elaboration.

In January, 1976, the Crow Tribal Council enacted an ordinance in Resolution No. 76-21A referred to as the

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[1] Because none of the existing parties challenged the merits of the Tribe's entitlement to the funds at the time of this Court's most recent Memorandum Opinion and Order of June 9, 1988, the validity of the tribal tax was not addressed therein. The issue has now been properly raised, and its determination is necessary for a full and final resolution of this matter. The Court will therefore now proceed to rule on that issue. The issue has been previously briefed by the parties in relation to the Crow Tribe's Motion for Release of Funds, and further briefing or oral argument is not deemed necessary by the Court.

Crow Tribal Coal Taxation Code which imposed a coal mining tax on each ton of marketable or merchantable coal severed or produced by means of strip coal mining or underground mining by a person within the Crow Tribe Reservation. The boundaries of the Reservation were defined in the tax ordinance to include the mineral estate held in trust by the United States for the Crow Tribe under that property known as the "Ceded Area" wherein the surface was ceded but the mineral estate was retained pursuant to the Cession Act of 1904, Act of April 27, 1904, 33 Stat. 352.

The tax rate was to be 25% of the contract sales price for each ton of coal. Because no deductions from the contract sales price were to be allowed for taxes paid to state or local governments (unlike the deductions permitted under Montana law in computing the amount of the tax), the amount of the Tribal tax probably would be slightly more than the amount of the Montana tax.

In accordance with the requirements of the Constitution of the Crow Tribe, the Taxation Code was submitted to the Department of Interior for approval. The Department approved the 1976 Taxation Code as it applied to the acknowledged Reservation but withheld its approval of the tax as it might be applied to mining activities on the Ceded Strip because it believed that the application of the tax to the mining of Crow coal on the Ceded Strip would be beyond the authority given to the Tribe by Article VI, Section 20 of the Constitution of the Crow Tribe. That provision authorized the Crow Tribal Council to impose taxes upon nonmembers of the Crow Tribe "doing business within the boundaries of the Crow Indian Reservation."

In response to that ruling, in January 1978, the Crow Tribe took steps to amend its Constitution so as to give it authority to tax the mining of coal on the Ceded Strip, reaffirmed its 1976 Crow Coal Taxation Code as it pertained to activities on the Ceded Strip and submitted both the amendment to the Constitution and the Taxation Code to the Department of the Interior for approval. Westmoreland opposed that application as it had opposed the original application because its operations would be adversely affected by having to bear both a 30% state severance tax and a 25% Crow Tribe coal mining tax.

In order to resolve the controversy between Westmoreland and the Tribe with respect to the Tribe's power to impose a tax on activities on the Ceded Strip, in 1982 Westmoreland and the Tribe entered into an Amended Lease Agreement wherein Westmoreland agreed to pay the Tribe a tax equal to the Montana state coal severance tax and the Montana state gross proceeds tax existing at that time and applicable to the mining of coal less whatever amount is required to be paid in severance and gross proceeds taxes to the State of Montana or its political subdivisions. The Crow Tribe also undertook to have the amendment to its Constitution approved by the Department of the Interior. Westmoreland jointly petitioned the Court with the Crow Tribe to pay the Montana state coal severance tax into Court pending resolution of the controversy as to whether or not the Montana coal severance tax was valid.

The Amended Lease Agreement was approved by the Crow Tribal Council. The Assistant Secretary of the Department of the Interior for Indian Affairs approved that agreement on September 29, 1982. The proposed

amendment to the Crow Tribe's Constitution and the Crow Tribal Taxation Code reaffirming the application of the amended Taxation Code to activities on the Ceded Strip was never approved by the Department of the Interior.

Westmoreland's Amended Answer to the Motion of the Tribe to release the funds claims that the Tribe is not entitled to the funds because it never put into effect a valid tax applicable to Westmoreland's mining activities on the Ceded Strip. Westmoreland's petition points out that it agreed only to pay a "tax" and that the Tribe never obtained approval by the Department of the Interior of any tax applicable to its activities on the Ceded Strip.

The Crow Tribe claims that it is entitled to the release of the proceeds because the 1982 Amended Lease Agreement constitutes a valid contractual obligation of Westmoreland. The Tribe, moreover, claims that it has had a valid tax in effect at all material times. The Tribe claims that the 1976 Tribal Coal Tax was properly applicable to the activities of Westmoreland in mining Tribal coal which has always been a part of the Reservation. In addition, the Tribe claims that the 1982 Amended Lease Agreement between Westmoreland the Tribe was itself a valid tax having been enacted by the Crow Tribe and approved by the Department of Interior.

DISCUSSION

Assuming the trust of everything that is said by Westmoreland in its Amended Answer in Opposition to the Motion for Release of Funds and in its Motion for a hearing on its claim that it is entitled to the funds, the

Court finds that the Crow Tribe of Indians, not Westmoreland, is entitled to the funds held in the Court. At all relevant times, the Crow Tribe has had a valid coal mining tax applicable to the mining by Westmoreland of its coal even though Westmoreland's mining activities were conducted on the Ceded Strip. The Court of Appeals for the Ninth Circuit has twice found that the underlying minerals which Westmoreland has been mining are a "component of the Reservation land itself." Crow Tribe of Indians v. State of Montana, 819 F.2d 895, 898. As observed by the Court of Appeals in its opinion in *Crow II*, this conclusion follows the plain meaning of the 1958 Act which restored to Reservation status all lands returned to Tribal ownership under the Act. 819 F.2d at 898. That decision has been affirmed. *Crow Tribe of Indians v. State of Montana*, 108 S.Ct. 695 (1988).

This analysis of the Reservation status of the Crow coal compels the conclusion that the approval which the Department of the Interior gave to the 1976 tax ordinance was fully applicable to Westmoreland's mining of Crow Ceded Strip coal because that coal was and is a component of the Reservation land itself. The approval of the Department of Interior of the 1976 Crow Tribal Tax Code as it applied to activities on the Reservation was necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow Tribal coal. Accordingly, the Interior Department's purported refusal to approve the tax as it might apply to any mining operation on the Ceded Strip was based on what the Ninth Circuit has found to be a mistaken interpretation of the applicable law.

The Crow Tribal Coal Taxation Code was modified and amended with respect to Westmoreland by the 1982 amendment to the lease which was approved by the Crow Tribal Council and the Department of the Interior. Accordingly, the amendment to the lease by reference to Montana law sets the applicable tax rate and conditions of computation and payment. The amount in the escrow fund is the result of payments by Westmoreland at the tax rate governed by the 1976 Crow Tribal Coal Taxation Code as modified and amended by the 1982 amendment to the lease.

Based on the foregoing,

IT IS ORDERED that the Motion of Westmoreland Resources, Inc., to amend its answer in opposition to the Crow Tribe's Motion to release funds is granted.

IT IS FURTHER ORDERED that the relief sought by Westmoreland Resources, Inc., in its Answer is denied because at all relevant times the Crow Tribe has had in effect a valid tax which Westmoreland Resources, Inc., has paid pursuant to the 1982 amendment to the lease, which funds are now in the escrow fund.

The Clerk is directed forthwith to notify counsel for the respective parties and all lienors of record of the making of this order.

Done and dated this 11th day of July, 1988.

/s/ James F. Battin
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, -vs- UNITED STATES OF AMERICA, Plaintiff-Intervenor, -vs- THE STATE OF MONTANA, et al., Defendants, -vs- WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	)	CV 78-110-BLG-JFB MEMORANDUM AND ORDER (Filed Sep. 19, 1988)

On September 8, 1988, a hearing was held in the above-captioned case concerning the disposition of approximately $29 million in Crow Tribal coal severance tax funds currently held in the registry of this Court. The issue presented for resolution at this time is whether the funds should be released directly to the Tribe as tribal tax revenues, pursuant to a 1982 Amendment to an Amended Lease entered into between the Crow Tribe and Westmoreland Resources, Inc., or whether the funds should be

turned over to the United States in trust for the Tribe, based on §8 of the 1982 Crow Tribal Coal Taxation Code.

Under the terms of the ordinance enacting the Crow Tribal Coal Tax, payment of coal severance taxes "shall be made in quarterly installments to the Treasury in trust for the Crow Tribe of Indians . . . ". *See*, 1982 Crow Tribal Coal Taxation Code, §8. The tax ordinance was modified with respect to Westmoreland Resources, Inc., by the execution of an Amendment to the Amended Lease Agreement between Westmoreland and the Tribe, entered into in 1982. The Tribe maintains that the Lease Agreement, as amended, supercedes [sic] the provisions of the Tax Code and requires that any coal severance tax payments made by Westmoreland be paid directly to the Tribe, as Lessor.[1] The United States, on the other hand, argues that the two enactments must be construed together, and any terms which are capable of co-existence must be retained. Since the Amended Lease Agreement does not expressly repeal the provisions of §8, they remain in force.

Having carefully considered the briefs and oral arguments of counsel, the Court is inclined to agree with the United States, that these funds are properly paid to the United States in trust for the Tribe. While the terms of the Amendment to the Amended Lease Agreement establish the obligation of Westmoreland to pay a tax to the Tribe, that document does not itself establish clear terms for the payment of the tax. Repeals by implication are not

[1] The amendment provides that the "Lessee will from time to time pay to the Lessor a tax . . . " *See*, Amendment to Amended Coal Mining Lease of Indian Lands, page 1, para. 1.

favored, *Morton v. Mancari*, 417 U.S. 535, 549 (1974), and any provisions of the Crow Tribal Tax Ordinance which were not expressly repealed or directly and clearly contradicted by the Amendment, remain in force with respect to Westmoreland. Thus, the §8 requirement that severance tax payments be made to the Treasury instead of directly to the Tribe remains a binding provision. Although the Tribe has attempted to repeal that provision, during the course of a July, 1988 Tribal Council meeting, the record indicates that the Secretary disapproved the repeal. As such, this Court cannot give legal effect to any such purported repeal. (Constitution and Bylaws of the Crow Tribal Council, Article VII, para. 10.)

At the time the Crow Tribal Coal Tax Ordinance was enacted, the Crow Tribe sought, and obtained the government's acceptance of, a trust relationship with respect to these particular tribal tax revenues. That trust relationship remains in existence to this date, and mandates release of these funds to the United States in trust for the Crow Tribe. Because this trust responsibility encompasses a complete authority over the management of funds so reposed, the Court finds that it would not be appropriate at this time to disburse any of the funds to accommodate liens or other claims presently asserted against the funds. Those matters may be resolved by the United States, after distribution of the funds by this Court.

With respect to certain funds previously paid directly to the Tribe by this Court and by Westmoreland Resources, Inc., the Court notes that at the time those distributions were made, in May, 1988 and August, 1988, the proper recipient of the funds had not yet been determined, and the United States either took no position or

had no objection to direct distribution to the Tribe. The Court therefore concludes that Westmoreland acted in complete good faith and proceeded in a reasonable manner under the circumstances, in making payment directly to the Tribe. Liability may not attach to Westmoreland at this time or in the future, based on this conduct.

Finally, because the Court sees no just reason to delay distribution of the funds in question in the manner previously described, judgment will be entered at this time, notwithstanding the fact that other claims for relief remain outstanding.

Based on the foregoing,

IT IS ORDERED that any and all Crow Tribal Coal Severance Tax funds currently held in the registry of this Court, including principal and interest, shall be distributed to the Department of Treasury of the United States, to be held in trust for the Crow Tribe. Distribution shall be made on October 25, 1988, pursuant to the terms of a forthcoming Memorandum and Order which will set forth in greater detail the basis for this decision as well as the terms of distribution.

The Clerk is directed to enter judgment accordingly.

The Clerk is further directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 19th day of September, 1988.

/s/ James F. Battin
Chief Judge

United States District Court

DISTRICT OF MONTANA

THE CROW TRIBE OF INDIANS
- Plaintiff

vs

UNITED STATES OF AMERICA
- Plaintiff-Intervenor

V.

THE STATE OF MONTANA,
et al - Defendants

vs

WESTMORELAND RESOURCES,
INC. - Defendant-Intervenor

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
CV 78-110-BLG-JFB

— Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT ANY AND ALL CROW TRIBAL COAL SEVERANCE TAX FUNDS CURRENTLY HELD IN THE REGISTRY OF THIS COURT, INCLUDING PRINCIPAL AND INTEREST, SHALL BE DISTRIBUTED TO THE DEPARTMENT OF TREASURY OF THE UNITED STATES, TO BE HELD IN TRUST FOR THE CROW TRIBE. IDSTRIBUTION [sic] SHALL BE MADE ON OCTOBER 25, 1988, PURSUANT TO THE TERMS OF A FORTHCOMING MEMORANDUM AND ORDER WHICH WILL SET FORTH IN GREATER DETAIL THE BASIS FOR THIS

DECISION AS WELL AS THE TERMS OF DISTRIBUTION.

SEPTEMBER 19, 1988
Date

LOU ALEKSICH, JR.
Clerk

/s/ Sandra L. Illegible
By Deputy Clerk

Court
(Seal)

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is entered into by and between the State of Montana ("Montana"), Big Horn County ("County"), and Westmoreland Resources, Inc. ("Westmoreland").

Recitals

WHEREAS, a dispute has arisen between Montana, the County and Westmoreland over the validity of imposing the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 15-35-205 (1989), and the Montana coal gross proceeds tax, Mont. Code Ann. §§ 15-23-701 to 15-23-703 (1989), upon certain ceded-strip production at the Absaloka facility mined pursuant to a lease with the Crow Tribe for some or all of the period between 1974 and 1987;

WHEREAS, Westmoreland was granted leave to intervene as a defendant in *Crow Tribe v. Montana*, No. CV-78-110-BLG; (D. Mont.), in November 1978 and asserted a cross-claim against, *inter alia*, Montana and the County in connection with such dispute;

WHEREAS, a cross-claim was most recently reasserted in Westmoreland's responsive pleading to the Crow Tribe's third amended complaint in No. CV-78-110-BLG; and

WHEREAS, the parties desire to resolve finally and conclusively and claims by Westmoreland to coal severance and gross proceeds tax payments made to Montana and the County between 1974 and 1987 with respect to

coal mined at the Absaloka facility pursuant to any lease with the Crow Tribe,

NOW, THEREFORE, it is agreed by and among the parties hereto as follows:

1. Westmoreland shall dismiss with prejudice its cross-claim against, *inter alia*, Montana and the County in its responsive pleading to the third amended complaint filed by the Crow Tribe in No. CV-78-110-BLG, with all parties to bear their own costs. Westmoreland further abandons, waives and otherwise disclaims any claim of entitlement for refund of coal severance of gross proceeds taxes paid to Montana and the County between, and including, the years of 1974 and 1987 with respect to ceded-strip production at its Absaloka facility pursuant to any leases with the Crow Tribe and shall not initiate any future judicial or administrative proceedings against Montana, the County, or their officers or employees to recover such taxes.

2. Montana shall tender the sum of $49,900 and the County shall tender the sum of $100 to Westmoreland upon receipt of this agreement fully executed by Westmoreland and an order in No. CV-78-110-BLG dismissing with prejudice Westmoreland's cross-claim asserted in its responsive pleading to the third amended complaint.

3. The parties recognize that this agreement represents a compromise of disputed legal claims and that execution thereof shall not be construed as an admission of the validity of such claims.

IN WITNESS WHEREOF, the parties have executed this agreement on those dates set forth below.

STATE OF MONTANA

/s/ Denis Adams
DENIS ADAMS
Director
Montana Department
of Revenue

Date: 9-6-91

BIG HORN COUNTY

/s/ John Doyle
JOHN DOYLE
Chairperson
Big Horn County
Commission

Date: 8-20-91

WESTMORELAND RESOURCES, INC.

/s/ C. Joseph Presley
C. JOSEPH PRESLEY
President

Date: 8-13-91

PLAINTIFF'S EXHIBIT 319

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CROW TRIBE OF INDIANS AND UNITED STATES OF AMERICA, Plaintiffs v. STATE OF MONTANA, ET AL. Defendants.	Civil No. 78-110 BLG-JDS

EXPERT WITNESS REPORT

Prepared by

Mark P. Berkman
Vice President

National Economic Research Associates, Inc.
Four Embarcadero Center, Suite 3250
San Francisco, California 94111
(415) 291-1000

May 3, 1993
(Revised March 31, 1994)

Expert witness for the
Crow Tribe of Indians
and the United States

I. INTRODUCTION AND SUMMARY

A. Summary

A National Economic Research Associates, Inc. (NERA) was retained by the U.S. Department of Justice to address several questions regarding the Crow Tribe's claims set forth in *Crow Tribe of Indians and United States of America v. State of Montana et al.* These questions and our findings are summarized as follows:

1. **In the absence of severance and gross proceeds tax revenues from Crow coal, did Montana and Big Horn County collect sufficient taxes from Westmoreland's Absoloka Mine during the period 1976 through 1986 to cover costs and burdens associated with that mine?**

   NERA has concluded that Montana and Big Horn County did collect sufficient revenues to cover the state and county's mine-related costs. As shown by Figure 1.1, these revenues, which included taxes and royalties earned on coal mined by Westmoreland on state lands, property and income taxes of Westmoreland and the mine contractor and personal income taxes of mine and related workers, totalled $29.3 million during the period 1976 through 1986. This greatly exceeds any governmental costs which can reasonably be associated with the mine.

2. **What is the current value of the severance taxes paid by Westmoreland to the State of Montana from fiscal years 1976 to 1982 on Crow coal and the gross proceeds taxes paid by Westmoreland to Big Horn County from fiscal years 1976 to 1987 on Crow coal?**

   NERA has determined the current value of these back taxes, including interest, is $315.5 million. This value is based on the taxes paid by Westmoreland in each year and annual interest rates corresponding to Montana's returns on its Coal Trust Fund. Figure 1.2 shows the actual amount paid and the interest earned for both the severance and gross proceeds taxes. A total of $46.8 million was paid in severance tax and $11.4 million was paid in gross proceeds tax. Interest on these payments totalled $257.3 million over the period.

3. **What is the value of the Crow Tribe's income loss as a result of the cancellation of Shell Oil Company's contracts to sell two utilities 8,000,000 tons of coal annually for twenty years under Shell's coal lease with the Crow Tribe?**

   NERA has calculated the Tribe's lost income to be $327.1 million. NERA determined this value by comparing what the Tribe would have earned if Shell's utility contracts had not been cancelled to the current value of the coal which remained in the ground because the contracts were cancelled. The current value is calculated using the proposed coal lease agreement between the Crow and Arch Minerals. The difference between the values of

the Shell contracts and the Arch agreement is NERA's damage determination of $327.1 million. This damage calculation is summarized in Table 1.1.

4. **Does the Crow Tribe need the revenues in question to provide government services to its members and to promote economic development on the Reservation?**

NERA has compiled information from the U.S. Census Bureau on employment, income and poverty on the Crow Reservation and the surrounding area. Data from the Census show that the Crow are much worse off economically than their non-Indian neighbors. In addition, economic conditions have worsened for the Tribe over the last 10 years, as measured by several important statistics. NERA calculated that the Crow would need to spend $38.7 million annually to bring Crow Tribe members to income parity with the rest of the State's residents.

B. Background

The State of Montana imposes several taxes on the production of coal including a severance tax, a gross proceeds tax and a resource indemnity tax. The severance and gross proceeds taxes were enacted in 1975 and went into effect in the same year. Severance tax revenues have been earmarked by the State for a variety of purposes, chief among which is the establishment of a permanent Coal Trust Fund. Initially, the Trust Fund was allocated 25

percent of the severance tax revenues (between fiscal years 1977 and 1979). The share was increased to 29.625 percent between July 1, 1979 and December 31, 1979 and then increased to a 50 percent share where it has remained. This fund has grown steadily over the years. At the end of fiscal year 1993, the Trust Fund stood at $497.6 million. This figure understates the value of the Trust Fund to the State. The State has invested the Trust Fund primarily in commercial and government bonds, generating substantial interest income which has been spent for numerous purposes. As shown in Table 1.2, the State has earned $535.6 million in interest over the period of fiscal year 1976 through fiscal year 1993. Thus, the State has enjoyed a combined revenue (Trust Fund plus interest) of $1 billion. All of the Westmoreland mine severance tax payments on Crow coal plus interest reinvested represent 25.4 percent of this figure. The State has also earned interest on other trust funds in which coal severance taxes were deposited. If the State had elected to invest and reinvest all of its severance tax revenues and interest income each year, as shown in Table 1.3, it would have a fund balance of $3.8 billion at the end of fiscal year 1993. All of the Westmoreland mine tax payments on Crow coal plus interest reinvested represent 6.9 percent of this amount.

C. Report Organization

This report is organized in four sections following this introduction. Section II considers whether income to the State and County related to the Westmoreland mine are sufficient to cover state and local government costs

associated with the mine. Section III presents our estimate of the value today of Westmoreland's tax payments on Crow coal during the period 1975 to 1982 and gross proceeds tax payments from 1975 through November 1987. Section IV presents our determination of the economic damage to the Crow Tribe from the cancellation of the Shell contracts to sell Crow coal to two electric utilities. Section V examines the Crow Tribe's socioeconomic conditions and estimates the funding levels required to improve those conditions.

Revenue from the Westmoreland Mine Other than Severance and Gross Proceeds Taxes on Crow Coal Greatly Exceeded Required Government Services

1976 - 1986

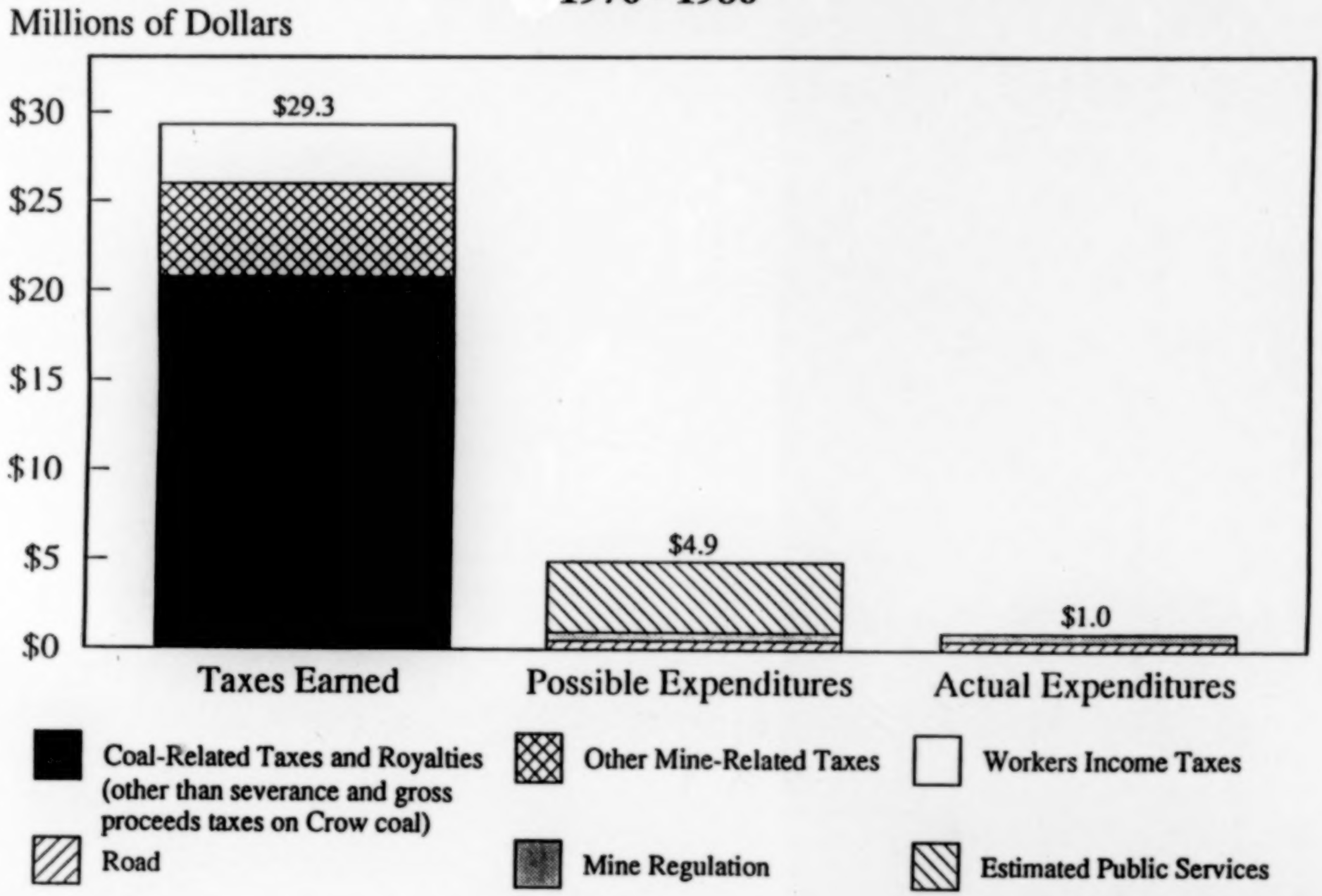


Figure 1.1

1994 VALUE OF SEVERANCE TAXES COLLECTED BY MONTANA CALCULATED BY USING THE MONTANA BOARD OF INVESTMENTS TIME-WEIGHTED RATES OF RETURN
1976-1993
(Assuming Middle of the Year Payments and Reinvestment of Interest)

Fiscal Year[1]	Interest Rate[2]	Severance Tax Paid[3]	Fund Balance[4]	Interest on Balance[5]	Interest on New Payments[6]	Cumulative Balance and Interest
(July-June)				(1)*(3)	(1)*[(2)/2]	(2)+(3)+(4)+(5)
	(1)	(2)	(3)	(4)	(5)	(6)
1976	6.68%	23,964,642	0	0	800,419	24,765,061
1977	16.20%	35,906,057	24,765,061	4,011,940	2,908,391	67,591,449
1978	-2.50%	34,372,065	67,591,449	(1,689,786)	(429,651)	99,844,077
1979	7.90%	42,689,164	99,844,077	7,887,682	1,686,222	152,107,145
1980	-1.80%	75,125,009	152,107,145	(2,737,929)	(676,125)	223,818,100
1981	-7.70%	70,415,074	223,818,100	(17,233,994)	(2,710,980)	274,288,200
1982	13.30%	86,186,846	274,288,200	36,480,331	5,731,425	402,686,802
1983	51.30%	80,044,981	402,686,802	206,578,329	20,531,538	709,841,650
1984	-1.50%	82,823,411	709,841,650	(10,647,625)	(621,176)	781,396,260
1985	38.10%	91,748,855	781,396,260	297,711,975	17,478,157	1,188,335,247
1986	21.60%	84,217,213	1,188,335,247	256,680,413	9,095,459	1,538,328,333
1987	7.80%	76,546,594	1,538,328,333	119,989,610	2,985,317	1,737,849,854
1988	6.50%	84,638,333	1,737,849,854	112,960,240	2,750,746	1,938,199,173
1989	14.10%	58,565,583	1,938,199,173	273,286,083	4,128,874	2,274,179,713
1990	9.20%	67,870,544	2,274,179,713	209,224,534	3,122,045	2,554,396,836
1991	12.70%	50,457,850	2,554,396,836	324,408,398	3,204,073	2,932,467,157
1992	14.60%	43,434,069	2,932,467,157	428,140,205	3,170,687	3,407,212,118
1993	10.83%	38,300,693	3,407,212,118	369,001,072	2,073,983	3,816,587,866
Totals		$1,127,306,983		$2,614,051,480	$75,229,403	$3,816,587,866
Westmoreland Payments and Interest on Crow Coal[7]		$46,811,029		$214,136,218	$1,753,963	$262,701,210
Remaining Value of Severance Taxes		$1,080,495,954		$2,399,915,262	$73,475,440	$3,553,886,656

Notes and Sources:

[1] Montana fiscal year is from July 1 to June 30 and tax year is from January 1 to December 31.
Taxes paid in each year are allocated half to that fiscal year and half to the following fiscal year.

[2] Time-weighted returns are based on *Fiscal Year Reports* for years 1976-1992 prepared by the Montana Board of Investments:
The interest rate for 1976 is based on the portfolio yields for the Trust and Legacy Fund.
For 1977-1981 the rates are based on the annualized time-weighted returns to the Trust and Legacy Fund.
For 1982-1992 the rates are based on the annualized time-weighted returns to the Coal Trust Fund.
The 1993 rate is the time-weighted total rate of return on the Permanent Coal Tax Trust obtained from the Montana State Board of Investments.

[3] Severance taxes are taken from Montana Tax Foundation, *Montana Taxation – 1992*.
The 1993 severance tax figure was obtained through personal communication with the Natural Resource & Corporation Tax Division of the Montana Department of Revenue.

[4] The fund balance is equal to the cumulative balance and interest from the previous year.

[5] Balance earns interest for a full year.

[6] Since new payments are not made until mid-year, they earn interest for only half a year.

[7] West Montana payments and interest on Crow coal are shown in Table 33.

II. GOVERNMENT TAXES ON COAL ARE NOT REQUIRED TO COVER MINING RELATED GOVERNMENT COSTS

A. Introduction

In a previous study, NERA demonstrated that from 1976 through 1982 the revenues generated by the State of Montana and its local governments through taxation of coal mining operations were much greater than the increased state and local government expenditures associated with coal mining.[1] We have been asked to update our analysis through 1987 and to reexamine the impacts associated with the Absoloka Mine. Based on our review of more recent data, we have determined that governmental costs associated with coal mining in general and with Westmoreland Resource's Absoloka Mine in particular have been minimal and are more than sufficiently addressed with funds derived from taxes other than severance and gross proceeds taxes on Crow coal through 1987. Income and property taxes paid to state and local governments by Westmoreland Resources; the coal mine operator, Morris-Knudsen; and the employees of the mine as well as taxes and royalties from production of state coal greatly exceed the cost of the services required by the mine.

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[1] Mark P. Berkman and Frederick C. Dunbar, Expert Witness Report on Behalf of the United States and the Crow Tribe of Indians, *Crow Tribe of Indians and the United States of America v. State of Montana et al.*, January 6, 1984, Exhibit 42.

B. Big Horn County Did Not Experience the Boom Town Phenomenon

Concerns about fiscal impacts associated with natural resource development relate to the "boom towns" which occurred in several cities in the western United States during the increase in mining resulting from the Arab oil embargo of the early 1970s. Typically, boom towns are areas where a rural community is inundated with a migration of individuals who work at a newly developed energy facility, including coal and uranium mines and power plants. Often, the number of new workers and their families are several times the original population of the area. Natives of the area, as well as the newcomers, suffer because the existing infrastructure of local governments cannot accommodate the service demands of the suddenly large population. Financially strapped communities are forced to swallow the bitter pill of higher taxes as well as overcrowded schools and hospitals, inadequate sewers and roads, etc. While the boom town phenomenon debilitated some western communities as their natural resources were developed, it is clear that no such problems occurred as a result of the development of Westmoreland's Absoloka mine.

1. The Absoloka Mine Did Not Cause a Large Migration of Workers

Big Horn County became a major coal-producing county in the 1970s. As shown in Table 2.1, coal production grew from 800,000 tons in 1972 to 16,175,000 tons in 1980. The Table also demonstrates that other counties within the Powder River Basin including Rosebud

County, Montana, and Campbell County, Wyoming also experienced dramatic coal production growth.[2] Unlike the other coal counties, however, Big Horn County did not experience substantial population growth as a result of the growth in coal production. In fact, as shown in Table 2.2, Big Horn County's population grew at a much lower rate than the other coal counties. The County's population growth rate was even lower than for the State of Montana overall between 1970 and 1980 – 10.3 percent versus 13.3 percent.

What differentiates Big Horn County from the other coal counties is the lack of population migration associated with mining. The work force associated with the Absoloka mine has never been very large and the Crow Reservation provided a substantial underutilized work force for mining operations and any secondary employment opportunities. Coal mining in the county provided employment for some of the many residents of the Crow Reservation. In fact, of the individuals working at the Absoloka mine, 60 percent of hourly workers and 20 percent of supervisory workers are Crow Tribe members.[3] A 1975 study by Mountain West Research also suggested a small migration.[4] Only 30 percent of the mine

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[2] The Powder River Basin refers to a major coal-producing area located in Montana and Wyoming. For a more detailed definition, see U.S. Department of Energy, Energy Information Administration, *Coal Production 1985, Washington, D.C.: GPO, 1986, pp. 4-8.*

[3] Personal communication with Joseph Presley, President, Westmoreland Resources, April 19, 1993.

[4] Montana West Research North, Inc., *Environmental Baseline Studies for the Crow Indian Leases: Socio-Economic Report,* Billings, MT, 1975.

employees surveyed by Mountain West were new residents of Big Horn County. Mine employment at the other large mines located in Big Horn County – Decker and Spring Creek – also resulted in little population growth. Many of the workers at these mines live in nearby Sheridan, Wyoming (City and County).

In fact, the 1990 Census reports only 129 mining industry workers living in Big Horn County, despite the County's rank as one of the largest coal-producing counties in the Country. This figure represents only 3.6 percent of the total employed and 2 percent of all individuals between the ages of 18 and 64 living in the County.

It is also instructive to examine the racial breakdown of the population change in Big Horn County between 1970 and 1990. Table 2.2 shows that, while the population of non-Whites in the county increased by 58 percent during the 20-year period, the population of Whites decreased by nearly 18 percent from 1970 to 1990. The increased population of non-Whites, virtually all of whom are Native American, clearly is not related to coal mining.

2. State and Local Governments Have Benefited from Coal Production

The State of Montana has collected over $1.1 billion in severance tax revenues since 1975.[5] In addition, $206.5 million dollars has been collected in gross proceeds taxes since 1975 in order to support county government in the counties where mines are located. The state's resource

[5] Montana Coal Council, *Montana Coal*, 1993.

indemnity trust tax has collected another $19.5 million from all nonrenewable resource producers since 1973.[6] The State has benefited greatly from this revenue; one only has to look at the $497.6 million Constitutional Trust Fund to see this. Local governments, too, have benefited from revenue associated with coal production. Due to the increased tax base resulting from coal mining, the Big Horn County mill levy showed no discernible increase over the period since mining began in the county. In 1973, the mill levy in Big Horn County was 107.86; by 1987 the mill levy had decreased to 91.00.[7] During the same period, the Consumer Price Index rose 156 percent.

By comparison, other Montana counties with populations similar to Big Horn raised property tax rates over the same period. Further evidence of the financial health of Big Horn County is contained in the data regarding the School Equalization Foundation Program administered by the Montana Office of Public Instruction. Under this program, all school districts in Montana receive an equivalent amount of funding per student. In instances where tax collections do not meet this funding level, the State provides additional funding to the school districts. School districts where collections are greater than this average amount are obliged to contribute the excess amount to

[6] Montana Coal Council, 1993, for collections through fiscal year 1992. Fiscal year 1993 collections were obtained through personal communication with the Office Manager at the Montana Coal Council.

[7] The mill levies represent the County rates only. Additional levies for cities, elementary and high school districts, and special districts such as water and sanitation may also apply. For example, the total mill levy applied to the Westmoreland mine in Big Horn County in 1987 was 146.27.

the equalization fund.[8] During the period 1977 through 1987, as shown in Table 2.3, Big Horn County contributed up to 53.3 percent of its school property tax revenues (elementary and high school) to the State. Also note that these contributions equaled or exceeded Westmoreland's gross proceeds tax payments on Crow coal every year after 1980.[9]

C. Mine-Related Public Services Demands on State and Local Governments Have Been Minimal

The only public project associated with the Westmoreland mine has been the repaving of a road between Hardin and the mine. This project cost the State approximately $0.5 million.[10] In addition, the State spent approximately $0.4 million in administrative costs for the

[8] For a more detailed description of the equalization program, see Montana Legislative Council, "The Montana School Foundation Program and State Equalization Aid: A Legislative and Financial History, 1949-1991," April 1992.

[9] Big Horn County was one of only three counties (Fallon and Rosebud were the others) which contributed to the state equalization fund every year from 1979-80 to 1987-88. As a result of a successful legal challenge, the state modified the equalization program in 1990. Big Horn County was a net recipient of equalization funds, less than one percent of its foundation funding, in 1978-79.

[10] Total project costs were approximately $2.4 million, but, federal funds for secondary highways financed 78 percent of this cost, or $1.9 million. This estimate is based upon the State's responses to question number 46 in Defendant's Answers to the Plaintiff's Fourth Set of Interrogatories and a Supplemental Response dated November 22, 1983.

regulation of the Westmoreland mine from 1973 to 1983.[11] In our previous report, we conservatively determined that employment at the Westmoreland mine had at most resulted in additional government services totaling $322,000 annually or $3.9 million over the disputed period.[12] As discussed above, however, there has been no significant population increase associated with the Absoloka mine and no public works projects other than the road to the mine have been identified as being mine related. In addition, since the mine created jobs in a area of high unemployment, the mine actually reduced the demand for some state and county service. Consequently, no increase in government services expenditures was caused by mining operations.

The Absoloka mine does not pose any future liability to Montana or to Big Horn County. No boom town has been created which may some day go bust. Future environmental costs to repair environmental damage are highly unlikely. The Absoloka mine is closely monitored and regulated at the federal, state and tribal levels and has not been a source of environmental problems. Twice monthly state inspections have resulted in only a limited

[11] This is Montana's estimate of its total cost for regulating coal mining on the ceded strip (the location of the Westmoreland mine) from 1973 to 1983. Adding the average annual cost of regulation for the years 1984 through 1986 would bring the total to $509,091 for the 14 year period 1973 to 1986. Adding this expense to the state's contribution to the road construction brings the total state expenditure to approximately $1.0 million through 1986. *Crow Tribe of Indians and United States of America v. State of Montana et al*, 1984. (Ex. D-383.)

[12] M. Berkman and F. Dunbar, 1983, p.II-16.

number of minor environmental citations to Westmoreland since mining began at the Absoloka mine.[13] Montana has an impressive record regarding environmental protection at its mines. According to the United States Department of the Interior, only 192 of nearly 140,000 violations of the Surface Mining Control and Reclamation Act (SMCRA) regulations between 1977 and 1992 were recorded in Montana.[14] Montana also requires a company to post a bond sufficient to cover the cost of reclamation before it is permitted to mine in the State.[15] The bond is not released until the reclamation is completed. The State also receives taxes and federal funds to cover future environmental damage. The resource Indemnity tax is collected by the State for the express purpose of funding future environmental remediation. In addition, the State also receive half of the SMCRA tax imposed by the U.S. Government on state coal mined by Westmoreland to cover mine-related environmental problems.

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[13] Personal communication with Joseph Presley, President, Westmoreland Resources, Inc., April 19, 1993.

[14] U.S. Department of the Interior, "Surface Coal Mining Reclamation: 15 years of Progress, 1977-1992," August 3, 1992.

[15] SMCRA mandates that mine operators must post a performance bond "sufficient to the cost of reclaiming the site in the event that the operators fail to complete reclamation," U.S. Department of Interior, August 3, 1992.

D. Revenue from the Westmoreland Mine Is Substantial Without Severance and Gross Proceeds Taxes on Crow Coal

Even in the absence of severance and gross proceeds taxes on the Crow coal mined by Westmoreland Resources, Montana collects substantial tax revenues and royalties from the mine. Over the period 1976 through 1986, during which the disputed taxes were paid, the State collected approximately $29.3 million in taxes and royalties from Westmoreland's state coal production as well as other taxes. As shown in Table 2.4, Montana collected severance and gross proceeds taxes and royalties on state coal produced by Westmoreland. Over the period 1979 through 1986 Westmoreland's state coal production generated approximately $17.2 million from these taxes and $1.4 million in royalties. Montana also receives tax revenues from all coal produced by Westmoreland *including Crow coal*. These revenues come from the State's Resource Indemnity Trust tax which generated $0.8 million over the disputed period. In addition, the SMCRA tax generated $1.4 million from the production of State coal over the disputed period. Montana and Big Horn County also obtained revenues from income and property taxes on the mine owners, operators and workers. For example, Westmoreland income and property taxes associated with the mine and property taxes on the mine's contractor, Morrison-Knudsen, totalled over $5 million.[16] The State also received income taxes from the workers at the mine and the secondary workers associated with the

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[16] We were unable to determine whether Morris Knudsen paid income tax to the State for its Westmoreland operations.

economic activity of the mine. These taxes totalled approximately $3.3 million from 1976 to 1986, based on employment at the mine, average miner salary and tax rate, and the multiplier effects of mine employment. The determination of this value is summarized in Table 2.5. As shown in the table, miner income tax revenues totaled $1.89 million over the period based on average Montana miner salaries as reported by the Montana Coal Council, the number of miners reported by Westmoreland and the Montana average state income tax rates derived from the *All States Tax Handbook*.[17] Income tax revenues from secondary workers totaled $1.43 million over the period. The number of secondary workers used to establish this value was determined by applying an employment multiplier for Montana prepared by the U.S. Department of Commerce.[18] Secondary worker income was based on average Montana salaries as reported in the U.S. Census. The same income tax rates were applied.

E. Revenues From the Westmoreland Mine Other Than Gross Proceeds and Severance Taxes on Crow Coal Greatly Exceed Mine-Related Governmental Costs

Montana and Big Horn County revenues from the Westmoreland mine excluding severance and gross

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[17] Westmoreland employment for 1984-1986 was estimated based on production and miner productivity.

[18] U.S. Department of Commerce, Economic and Statistics Administration, Bureau of Economic Analysis, "Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)," Washington, D.C.: GPO, Second Edition, May 1992.

proceeds taxes on Crow Coal exceeded mine related government expenses by over $20 million. This is true even if we include our previous estimate for annual governmental expenses for new miners.[19] Mine related income and property taxes alone cover government costs associated with the Westmoreland mine. Figure 2.1 illustrates the substantial disparity between these revenues and the mine-related government expenditures.

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[19] Berkman and Dunbar, 1983.

Revenue from the Westmoreland Mine Other than Severance and Gross Proceeds Taxes on Crow Coal Greatly Exceeded Required Government Services

1976 - 1986

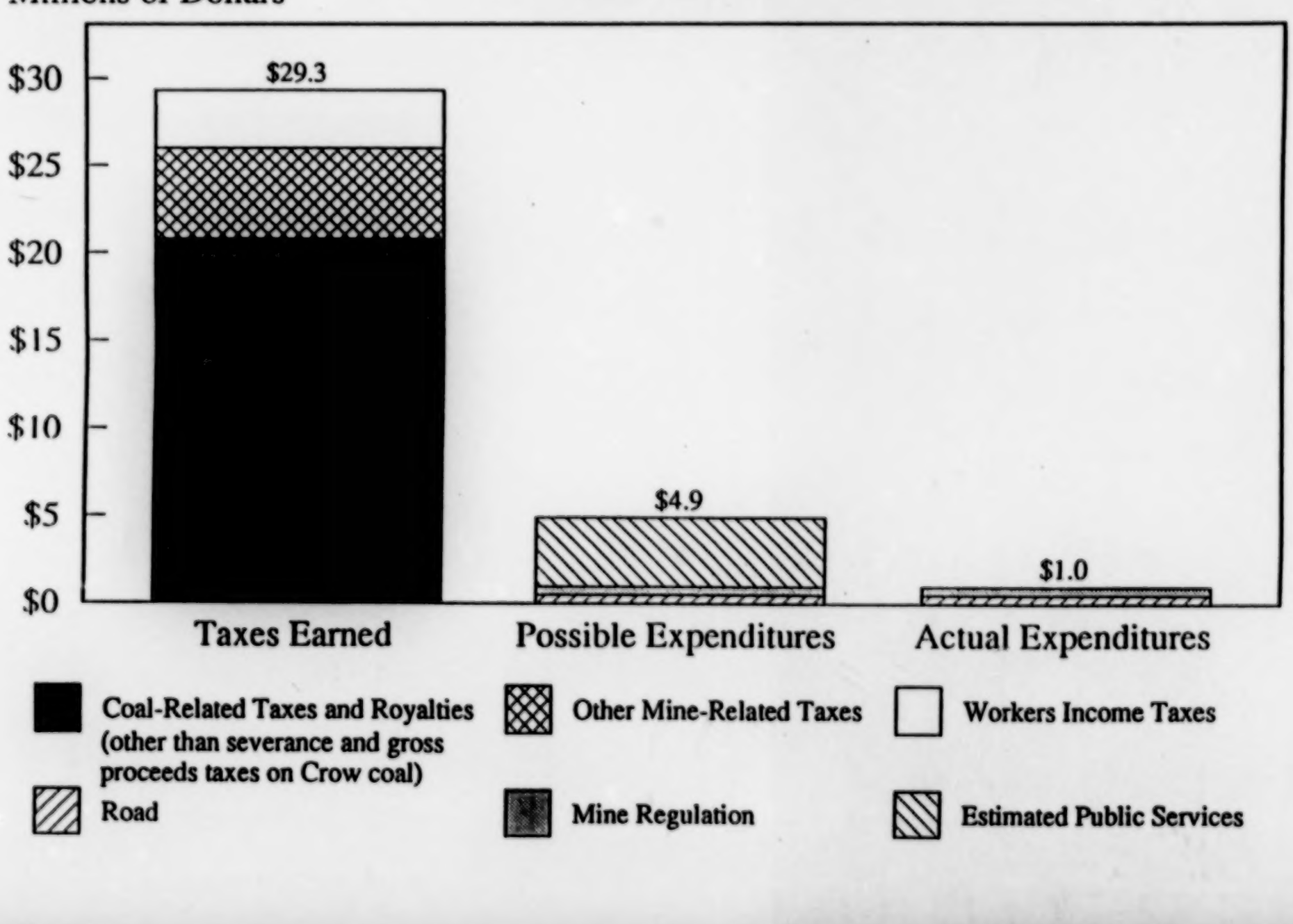


Figure 2.1

Table 2.1

COAL PRODUCTION FOR MONTANA AND WYOMING AND SELECTED COUNTIES
1972 - 1992

Year	Montana (1)	Big Horn County (2)	Rosebud County (3)	Wyoming (4)	Campbell County (5)	Sheridan County (6)
			----------Thousand Tons----------			
1972	8,200	800	7,900			
1973	10,724	4,200	6,300	14,886	1,623	463
1974	14,106	8,315	5,440	20,702	4,051	1,023
1975	22,054	13,200	8,500	23,805	N/A	N/A
1976	26,231	14,900	11,700	30,836	N/A	N/A
1977	27,226	14,769	12,114	46,028	17,450	2,395
1978	26,600	13,620	12,652	58,328	29,204	2,861
1979	32,676	18,131	14,191	71,523	41,046	3,524
1980	29,948	16,175	13,392	94,968	61,471	4,287
1981	33,545	19,556	13,721	102,969	71,723	2,736
1982	27,882	15,336	12,341	108,360	81,224	3,002
1983	28,924	16,559	12,143	112,213	88,160	2,920
1984	33,000	16,880	15,858	130,914	106,811	2,531
1985	33,286	17,313	15,740	140,711	113,972	2,363
1986	33,978	18,820	14,897	136,820	111,638	1,359
1987	34,399	18,810	15,297	146,849	122,335	1,188
1988	38,881	18,711	19,929	164,014	135,975	945
1989	37,742	20,044	17,395	171,558	143,865	111
1990	37,616	20,852	16,400	184,249	154,832	119
1991	38,227	20,820	17,124	193,854	165,024	158
1992	38,879	22,055	16,577	190,169	159,726	71
Production Growth (1973 - 1981)	212.8%	365.6%	117.8%	591.7%	4319.2%	490.9%
Production Growth (1973 - 1992)	262.5%	425.1%	163.1%	1177.5%	9741.4%	-84.7%

Sources: U. S. Department of Energy, Energy Information Administration, *Coal Production*, 1976 - 1992. U. S. Department of the Interior, *Mineral Industry Surveys*, 1973 - 1975. *Keystone Coal Industry Manuals*, 1972 - 1976.

POPULATION GROWTH IN MONTANA, BIG HORN COUNTY AND OTHER COAL PRODUCING COUNTIES

1970 - 1990

Jurisdiction	1970 (1)	1980 (2)	1990 (3)	Percent Change 1970 - 1980 (4) (2)/(1)	Percent Change 1980 - 1990 (5) (3)/(2)	Percent Change 1970 - 1990 (6) (3)/(1)
Montana	694,409	786,690	799,065	13.3%	1.6%	15.1%
Big Horn County	10,057	11,096	11,337	10.3%	2.2%	12.7%
Hardin	2,733	3,300	2,940	20.7%	-10.9%	7.6%
Big Horn						
White	6,018	5,781	4,939	-3.9%	-14.6%	-17.9%
Non-White	4,039	5,315	6,398	31.6%	20.4%	58.4%
Other Coal Counties						
Rosebud, MT	6,032	9,899	10,505	64.1%	6.1%	74.2%
Campbell, WY	12,957	24,367	29,370	88.1%	20.5%	126.7%
Sheridan, WY	17,852	25,018	23,562	40.3%	-5.9%	32.0%

Source: U. S. Bureau of the Census, *Census of Population and Housing, 1970, 1980 and 1990.*

Table 2.2

Table 2.3

BIG HORN COUNTY CONTRIBUTED TO THE MONTANA SCHOOL EQUALIZATION PROGRAM 1977 - 1987

Fiscal Year[1]	Big Horn County Collections (1)	Amount Recaptured by State (2)	Percent Recaptured by State (3) (2)(3)
1977 - 78	2,161,711	235,957	10.9%
1978 - 79	2,363,552	(18,391)	-0.8%
1979 - 80	2,986,553	463,817	15.5%
1980 - 81	4,982,786	2,445,952	49.1%
1981 - 82	6,348,892	3,383,919	53.3%
1982 - 83	5,090,451	1,799,188	35.3%
1983 - 84	5,376,735	1,932,999	36.0%
1984 - 85	5,810,583	2,166,916	37.3%
1985 - 86	5,681,261	1,868,227	32.9%
1986 - 87	5,565,087	1,719,375	30.9%
1987 - 88	5,067,324	1,295,793	25.6%

[1] Montana fiscal year is from July 1 to June 30 and tax year is from January 1 to December 31. Taxes paid in each year are allocated half to that fiscal year and half to the following fiscal year.

ESTIMATED STATE AND COUNTY REVENUES FROM THE WESTMORELAND MINE OTHER THAN TAXES RECEIVED FROM INDIAN COAL 1976 - 1986

Tax	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	Total
Coal Related												
Severance (State Coal)[1]	0	0	0	880,246	3,329,220	2,212,313	107,777	2,123,272	2,303,235	2,393,097	1,504,722	14,853,882
Gross Proceeds (State Coal)[2]	0	0	0	0	147,458	555,510	346,918	90,193	339,746	368,216	477,981	2,326,022
Royalties (State Coal)[3]	0	0	0	102,452	350,374	196,577	41,243	179,333	194,818	195,693	135,860	1,396,348
Resource Indemnity Tax (All Coal)[4]	51,819	63,621	64,220	73,707	82,507	86,078	86,105	91,611	87,027	68,873	63,477	819,045
SMCRA (State Coal)[5]	0	0	0	102,452	350,374	196,577	41,243	179,333	194,818	195,693	135,860	1,396,348
												20,791,646
Other Mine Related												
Westmoreland Income Taxes[6]	135,698	135,698	92,275	213,204	2,663	173,769	196,577	135,698	135,698	135,698	135,698	1,492,674
Westmoreland Non-Coal Property Taxes[7]	45,834	48,843	151,621	145,197	390,616	349,326	273,491	265,047	244,806	217,880	244,478	2,377,140
Morrison-Knudsen Property Taxes[8]	78,007	81,630	163,119	167,354	262,947	127,019	105,644	74,687	87,812	76,716	76,890	1,301,824
												5,171,637
Mine Workers[9]												
Miners Income Taxes	100,419	149,027	170,715	202,693	214,558	224,856	168,911	164,251	166,333	167,067	164,888	1,893,718
Secondary Income Taxes	76,064	112,883	129,310	153,533	162,520	170,320	127,944	124,414	125,991	126,548	124,897	1,434,424
												3,328,142
TOTALS	487,841	591,701	771,260	2,040,838	5,293,236	4,292,344	1,495,854	3,427,838	3,880,285	3,945,479	3,064,750	29,291,426

Years are Montana tax years, from January 1 to December 31. Taxes are paid in subsequent fiscal years, which are from July 1 to June 30.

Sources and Notes:

[1] Severance taxes are from Attachment A to State's responses to Fifth Set of Interrogatories, *Crow Tribe of Indians v. State of Montana* and information provided by Westmoreland Resources.
[2] Gross proceeds taxes are from Attachment NN to State's Second Supplemental Response to Fifth Set of Interrogatories, *Crow Tribe of Indians v. State of Montana.*
[3] Royalties are equal to $0.175 per ton of production on state lands.
[4] Resource indemnity tax is equal to 0.4% of the market value of coal sales; 1976 - 1982 values are from 1983 NERA expert report - Table 8, p. 1-13. Remaining years are estimated.
[5] State earns half the Surface Mining Control and Reclamation Act (SMCRA) tax of $0.35 per ton of coal mined on state lands.
[6] Westmoreland income taxes for 1976 to 1982 are taken from 1983 NERA expert report – Table 8, p. 1-13. Remaining years are estimated.
[7] Westmoreland property taxes are from Attachment JJ to State's Second Supplemental Response to Fifth Set of Interrogatories, *Crow Tribe of Indians v. State of Montana.*
[8] Morrison-Knudsen property taxes are from Attachment KK to State's Second Supplemental Response to Fifth Set of Interrogatories, *Crow Tribe of Indians and v. State of Montana.* Morrison-Knudsen income taxes were not available.
[9] NERA calculations based on mine employment and average income of Westmoreland Resources, an average Montana income tax rate as found in Research Institute of America, *All State Tax Handbook,* and secondary employment as determined by U.S. Department of Commerce, Regional Input-Output Modeling System.

Table 2.4

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor vs. STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants.	No. CV-78-110-BLG-JDS **FINAL PRE-TRIAL ORDER (Amended 4/4/94)**

The Court hereby enters the following amended Final Pretrial Order pursuant to Local Rule 235-6.

* * *

IV. AGREED FACTS[1]

A. Plaintiff Crow Tribe of Indians is a sovereign American Indian Tribe, with a governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

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[1] The parties reserve the right to contest the relevance or materiality of any of the following Agreed Facts.

B. Defendant State of Montana is a sovereign state of the Union, admitted pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

C. Defendant Michael J. Robinson is Director of the Montana Department of Revenue. He is sued in his official capacity.

D. Defendant Big Horn County, Montana, is a political subdivision of Montana. Most of the Crow Indian Reservation and of the Crow Tribe's coal resources are encompassed within the exterior boundaries of Big Horn County.

E. Defendant Martha Fletcher is Treasurer of Big Horn County. She is sued in her official capacity.

F. Defendants Robinson and Fletcher are the State and County officials charged under Montana law with the enforcement and collection of Montana's coal severance and gross proceeds taxes.

G. Plaintiff-intervenor United States holds in trust, and the Tribe is the beneficial owner of, large amounts of coal resources underlying the Crow Indian Reservation and the ceded strip. In *Crow II, supra,* the Court of Appeals held that the tribally owned coal within the ceded strip is part of the Crow Indian Reservation. The United States supervises the development of the Tribe's mineral resources through the Department of the Interior and the Bureau of Indian Affairs.

H. The Tribe granted coal prospecting permits to, and entered into coal leases with, several mining companies which were approved by the Secretary of the Interior.

I. On September 16, 1970, Westmoreland Resources, Inc. was the successful bidder at a sale of prospecting permits covering tribal coal underlying approximately 34,000 acres in the ceded strip. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying approximately 31,000 acres of that land. The two leases were approved by the Department of the Interior on June 14, 1972 pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g. The leases were amended on November 26, 1974. One of the leases, which encompassed approximately 16,000 acres, was subsequently terminated on February 16, 1982 by mutual consent of the Tribe and Westmoreland with the approval of the Interior Department on March 25, 1982.

J. In the early 1970s, the Crow Tribe granted coal prospecting permits to AMAX, Gulf and Peabody coal companies and entered into a coal lease with AMAX. The permits and lease were approved by the Bureau of Indian Affairs. The permits and the AMAX lease have lapsed. No coal production took place.

K. On April 22, 1968 the Department of the Interior approved a mineral prospecting permit between the Crow Tribe and Shell Oil Company. On June 8, 1972, the Department of the Interior approved a coal lease between the Tribe and Shell Oil Company under the Indian Mineral Leasing Act of 1938 with respect to the coal underlying approximately 30,000 acres of land within the Reservation's exterior boundaries. On December 16, 1974, Shell executed a contract for the sale and purchase of coal with Cajun Electric Power Cooperative, Inc., which coal was to be mined from a proposed facility, to be known as the Youngs Creek mine, located within the area leased

from the Tribe. On January 23, 1975, Shell entered into a contract for the sale and purchase of coal with Houston Lighting and Power Company, which coal also was to be mined from the Youngs Creek mine. The contract with Cajun Electric was canceled by mutual agreement on February 23, 1981 and the contract with Houston Lighting and Power was canceled by mutual agreement on March 16, 1981.

L. On January 3, 1976, the Tribe filed suit against, *inter alia*, Shell seeking to invalidate the 1972 coal lease. *Crow Tribe v. Kleppe*, No. CV-76-10-BLG (D. Mont.). On May 17, 1978 the District Court entered an order determining the lease was defective because of a failure to comply with 25 C.F.R. §171.9(b). Judgment was entered on May 19, 1978 consistent with such determination. The litigation continued with respect to other grounds upon which the Tribe challenged the lease's validity.

M. On May 8, 1980, the Tribe and Shell entered into a new mining agreement which superseded the 1972 coal lease. The 1980 agreement applied to the coal underlying 2560 acres within the Reservation, including the land where the Youngs Creek mine was to be constructed. It also included options for mining Crow coal underlying other lands within the Crow Indian Reservation. The agreement was approved by the Department of the Interior pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. §§2101-2108, on April 1, 1983. The 1980 agreement provided that, upon Departmental approval, dismissal of the Tribe's claims in No. CV-76-10-BLG (D. Mont.) against Shell and the latter's counterclaims against the Tribe would be requested, and such dismissal

was entered on September 9, 1983. On December 30, 1985, Shell relinquished its rights under the 1980 agreement.

N. Westmoreland has been the only producer of tribal trust coal to date. Its facility is known as the Absaloka mine.

O. In 1975, the Montana Legislature enacted statutes which impose two taxes on coal mine operators in Montana, a severance tax and a gross proceeds tax, on each ton of coal produced and sold. Mont. Code Ann. §§15-35-101 through 15-35-111 and 15-23-701 through 15-23-704.

P. The Montana coal severance tax, Mont. Code Ann. §15-35-103, is "imposed on each ton of coal produced in the State." There are no exceptions for coal owned by Indian tribes or located within Indian reservations. The tax is measured by the value of the "contract sales price" of the coal, which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production." Mont. Code Ann. §15-35-102. The tax applied to production occurring after June 30, 1975.

Q. The rate of Montana's severance tax has varied depending on such factors as the time the coal was produced, its heating quality and whether it was extracted through surface or underground mining. At all relevant times, the coal mined by Westmoreland was taxed at the rate of thirty percent.

R. In 1987, the Montana Legislature reduced the coal severance tax to 25 percent for production during fiscal years 1989 and 1990, to 20 percent for production

during fiscal year 1991, and to 15 percent for production during fiscal year 1992 or thereafter if the Montana Department of Revenue certified by October 1, 1988 that the coal tonnage produced in Montana during fiscal year 1988 exceeded 32.2 million. 1987 Mont. Laws Chapt. 608. The Department so certified, and the reductions took effect. The current Montana severance tax rate is 15 percent of the contract sales price. See Mont. Code Ann. §15-35-103 (1991).

S. In 1985, the Montana Legislature enacted a new coal production incentive credit of 33⅓ percent to be applied against any severance tax otherwise due with respect to any incremental production produced and sold during calendar years 1985 and 1986. 1985 Mont. Laws Chapt. 636. New coal production incentive credits also were authorized in subsequent legislation for incremental production produced for periods through June 30, 1991. 1987 Mont. Laws Chapt. 609, §5 (50 percent credit for incremental production sold after December 31, 1986 and before July 1, 1988; 40 percent credit for incremental production sold after June 30, 1988 and before July 1, 1990); 1989 Mont. Laws ch. 31, §3 (25 percent credit for incremental production sold after June 30, 1990 and before July 1, 1991); *see* Mont. Code Ann. §§15-35-201 to -205 (1991).

T. The gross proceeds coal tax is imposed on "each person engaged in mining coal." Mont. Code Ann. §15-23-701. There are no exceptions for coal owned by Indian tribes or located within Indian Reservations. Each person mining coal must file with the State Department of Revenue an annual report that must include, *inter alia*, a statement of the number of "tons of coal extracted,

treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales price." Mont. Code Ann. §15-23-701. The Department of Revenue transmits the valuation of the gross proceeds of the mine to the county assessor of each county in which the coal mines are located. Mont. Code Ann. §15-23-702. The county assessor then enters the value on an assessment roll, Mont. Code Ann. §15-23-702, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont. Code Ann. §15-23-703.

U. As enacted in 1975, the amount of the gross proceeds tax was equal to the number of mills levied for general property tax purposes by the county where the production occurred multiplied by the contract sales price of the production occurring during the particular fiscal year. The tax rate varied from time to time and from county to county but added roughly another 5% to the coal producers' tax bills on an annual basis. The gross proceeds tax became effective with respect to production occurring after June 30, 1975. In 1989, the Montana Legislature modified the gross proceeds tax rate to 5 percent of the contract sales price for production occurring after June 30, 1989. *See* 1989 Mont. Laws Chapt. 11, §77 (June 1989 Spec. Sess.) Mont. Code Ann. §15-23-703(1) (1991).

V. A portion of severance tax payments for coal production between July 1, 1975 and December 31, 1983 was allocated for current expenditures. Among other things, severance tax revenues have been used for the State's general fund, state equalization aid to public schools, coal area highway improvements, archaeological preservation, various cultural projects, alternative energy

research, general funds of the counties where the coal is mined, county land planning, and for a sinking fund servicing renewable resource development bond accounts. Mont. Code Ann. §15-35-108.

W. A portion of coal severance tax payments was allocated to three trust funds whose corpus was unavailable for current expenditure during that period but whose income and interest were available for expenditure. The proportion of the trust fund allocation and the trust funds to which the allocation was made were:

(1) Between July 1, 1975 and June 30, 1977, 10 percent of total collections was allocated to the education trust fund account; between July 1, 1977 and June 30, 1979, 7.5 percent was allocated to this trust; between July 1, 1979 and December 31, 1979, 15 percent was allocated to this trust; and between January 1, 1980 and December 31, 1983, 10 percent was allocated to this trust. *See* 1975 Mont. Laws Chapt. 502, §§3, 7; 1977 Mont. Laws Chapt. 540, §3; 1979 Mont. Laws Chapt. 653, §1. All monies in this fund as of June 30, 1990 were appropriated to the Superintendent of Public Instruction for school equalization payment purposes during fiscal year 1991. 1989 Mont. Laws Chapt. 11, §95 (June 1989 Spec. Sess.).

(2) Between July 1, 1975 and June 30, 1977, 1.25 percent of total revenues was allocated to the fish, wildlife and parks-arts council trust fund; between July 1, 1977 and June 30, 1979, .9375 percent was allocated to this fund; between July 1, 1979 and December 31, 1979, 3.75 percent was allocated to this fund; and between January 1, 1980 and December 31, 1983, 2.5 percent was allocated to this trust fund. See 1975 Mont. Laws Chapt. 502, §3;

1977 Mont. Laws Chapt. 549, §1; 1979 Mont. Laws Chapt. 653, §1; 1983 Mont. Laws Chapt. 281, §3.

(3) Between July 1, 1977 and December 31, 1979, 25 percent of total revenue was allocated to the coal severance tax trust fund established under Mont. Const. Art. IX, §5; and between January 1, 1980 and December 31, 1983, 50 percent was allocated to this Constitutional trust fund. *See* 1977 Mont. Laws Chapt. 540, §1.

X. The Constitutional trust fund contains only coal severance tax monies paid by Montana producers. The principal of the fund may only be invaded on a three-fourths vote of the Montana Legislature. The Montana Legislature may appropriate, and has appropriated, the interest and income earned by the fund. As of June 30, 1993, the book value of the Constitutional trust fund was $505,977,318.

Y. The Crow Tribe enacted a Coal Taxation Ordinance in January 1976 imposing a 25 percent tax on the contract value of all coal mined within the Reservation's exterior boundaries and of coal beneficially owned by the Tribe within the ceded strip. The taxation code was subject to review by the Department of the Interior under article VI, section 10 of the Tribe's Constitution and Bylaws. In February 1977, the Department's Acting Commissioner of Indian Affairs approved the code for application within the exterior boundaries of the Reservation but withheld approval with respect to coal production within the ceded strip based on a limitation in the Tribe's Constitution.

Z. By agreement dated July 10, 1982, which was approved by the Interior Department on September 29,

1982, Westmoreland agreed to pay the Tribe amounts equal to Montana's severance and gross proceeds taxes less any amounts of those taxes paid to Montana and to Big Horn County.

AA. The Tribe has not demanded that Westmoreland pay the tax obligations allegedly imposed under the Tribe's 1976 code. In April 1993, the Crow Tribe filed a motion for leave to file its Fifth Amended Complaint. In its proposed Complaint, the Tribe asserted a claim against Westmoreland for recovery of the taxes due under the Tribe's 1976 Coal Taxation Ordinance for the period prior to September 1982 if and to the extent that the Tribe does not recover in this action the severance and gross proceeds taxes on Crow coal that Westmoreland paid to Montana and Big Horn County during that period. The Crow Tribe has not otherwise requested tax payments from Westmoreland pursuant to the 1976 code.

AB. For the period between July 1, 1975 and December 31, 1982, Westmoreland paid severance taxes to Montana with respect to coal held in trust for the Tribe by the United States in the following amounts (by fiscal year) and with the following allocations to the trust funds described in paragraph W above (by fiscal year):

Year	Tax Amount	Coal Trust	Educ. Trust	FWP Trust
1976	$ 5,282,763.01	$	$ 528,276.30	$ 66,034.54
1977	5,834,899.75		583,489.98	72,936.25
1978	6,720,489.48	1,680,122.37	504,036.71	63,004.59
1979	6,987,988.94	1,746,997.24	524,099.17	65,512.40
1980	5,778,393.90	2,046,023.88	236,562.19	59,140.54
1981	5,852,067.73	2,926,033.87	585,206.77	146,301.69
1982	7,714,644.08	3,857,322.04	771,464.41	192,866.10
1983	2,639,781.65	1,319,890.83	263,978.17	65,994.54
Totals	$46,811,028.54	$13,576,390.23	$3,997,113.70	$731,790.65

Additional amounts reverted to the education trust fund from another account, known as the local impact fund account, during fiscal years 1977 through 1983.

AC. For the period between July 1, 1975 and December 31, 1987, Westmoreland paid gross proceeds taxes to Big Horn County with respect to coal held in trust for the Tribe by the United States in the following amounts by calendar year:

Year	Tax Amount
1975	$ 124,227.31
1976	787,849.87
1977	919,469.69
1978	1,076,494.88
1979	1,153,727.54
1980	1,205,139.87
1981	863,312.12
1982	1,086,733.89
1983	1,422,458.46
1984	1,026,286.10
1985	871,323.90
1986	892.090.63
Total	$11,429,114.26

All gross proceeds tax revenue received by Big Horn County was allocated for current expenditures as authorized or required by Mont. Code Ann. §15-23-703, *et seq.* Allocation of gross proceeds revenue for fiscal years 1975 through 1986 was as follows:

State of Montana	$ 674,888.74
Big Horn County	3,060,345.17
School District 17-H	2,609,119.49
County-Wide Schools	5,004,344.80
Cemetery District No. 1	77,972.41
County Planning	2,443.65

Big Horn County transferred a portion of the sum of $5,004,344.80, above-designated as "County-Wide Schools" to the State of Montana for recapture by the State for placement in its school equalization account.

AD. Westmoreland did not initiate appropriate proceedings under Montana law to recover, or otherwise secure a refund of, the severance and gross proceeds taxes paid to Montana and Big Horn County based on the production of Crow coal.

AE. Montana, Big Horn County and Westmoreland entered into an agreement providing for the settlement and dismissal with prejudice of Westmoreland's cross-claim against Montana and Big Horn County contained in its responsive pleading to the Tribe's Third Amended Complaint. Under that agreement, Westmoreland waived and/or disclaimed any claim of entitlement to a refund of severance and gross proceeds taxes paid between, and including, calendar years 1974 and 1987 with respect to ceded strip production pursuant to its lease with the Tribe. The agreement was executed on September 6, 1991.

AF. Westmoreland deposited severance tax payments in the amount of $23,404,483.74 into the District Court Registry pursuant to the Court's Order dated January 4, 1983 and gross proceeds tax payments in the amount of $536,475.06 into that Registry pursuant to the Court's Order dated November 25, 1987.

AG. Westmoreland has not paid any taxes to the Tribe pursuant to the Tribe's 1976 Coal Tax Ordinance. Pursuant to the September 1982 lease amendment, Westmoreland has paid the Tribe amounts equal to the State

severance tax obligations of Westmoreland for the period commencing July 1, 1982 through the present. Pursuant to the September 1982 lease amendment, Westmoreland also has paid the Tribe amounts equal to the State gross proceeds tax for the period commencing with the gross proceeds tax payment due to Big Horn County in November 1987 through the present.

AH. According to the 1990 Census, the unemployment rate for Native Americans on the Crow Reservation was 44% as compared to 6% for non-Indians in Montana and 3.3% for non-Indians in Big Horn County. Per capita annual income for Native Americans on the Crow Reservation was $4,243 while non-Indians in Big Horn County earned $10,717 per year on a per capita basis. From 1979 to 1989, per capita income measured on a constant dollar basis increased by 17 percent for non-Indians in Big Horn County while real per capita income of Native Americans in Big Horn County fell by 11% over the same period. Fifty percent of the Native Americans on the Crow Reservation are living in poverty as compared to 13% of the non-Indians living in Big Horn County. From 1980 to 1990, the percentage of Native Americans in Big Horn County living below the poverty line increased from 32% to 53%.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor vs. STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants, and WESTMORELAND RESOURCES, INC., Defendant-Intervenor	No. CV-78-110-BLG-JDS **FINAL PRE-TRIAL ORDER (Amended 4/4/94)**

The Court hereby enters the following amended Final Pretrial Order pursuant to Local Rule 235-6.

VII. POINTS OF LAW

* * *

C. Whether the violations by Montana and Big Horn County of the Indian Mineral Leasing Act and of

the sovereign rights of the Crow Tribe give rise to one or more of the following causes of action:

a. recovery through restitution of the illegal taxes imposed and collected by Montana and Big Horn County;

b. damages owing to the unlawful interference with the business and contractual relationships between the Crow Tribe and the Shell Oil Company;

c. recovery through restitution of revenues received by Montana and Big Horn County as a result of their violation of the Indian Mineral Leasing Act or the sovereign rights of the Crow Tribe or of their interference with the business and contractual relationships between the Crow Tribe and the Shell Oil Company.

1. *Tribe's and United States' Position.* It has already been conclusively established that Montana and Big Horn County violated the Indian Mineral Leasing Act of 1938 and the sovereign rights of the Crow Tribe by imposing and collecting their illegal severance and gross proceeds taxes on Crow coal. These violations of federal law give rise to whatever remedies are necessary and appropriate to redress those wrongs, to fulfill the Indian Mineral Leasing act and the Tribe's sovereign rights, to restore the Tribe to the position it would have occupied if the violations had not occurred and to deprive the wrongdoers of any gains from their illegal acts. *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1032, 117 L. Ed. 2d 208, 216-220 (1992) (the availability of all appropriate remedies to redress violations of federal law is presumed unless Congress has expressly indicated otherwise); *County of Oneida v. Oneida Indian Nation*, 470

U.S. 226, 233-240 (1985); *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 696 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies"); *Bangor Punta Operations v. Bangor & Aroostoock Railroad Co.*, 417 U.S. 703, 711 (1974) (shareholders should not be allowed to reap a profit from wrongs done to others); *R.H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934) ("no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong"); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1552 (9th Cir. 1989) (purpose of the unjust enrichment remedy is to deprive the defendant of his ill-gotten gains); *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988); December 26, 1990 Memorandum Opinion and Order at 5 and 15-16, *essentially affirmed* in *Crow III*; *Nelson v. Serwold*, 687 F.2d 278, 281 (9th Cir. 1982) (purpose of restitution is to restore the defrauded party to the position he would have had absent the fraud and to deny the fraudulent party any benefits, whether foreseeable or not, which derive from his wrongful act).

Based on these principles and authorities, the violations of federal law established in *Crow II* should be remedied through the three causes of action described above.

2. Defendants' Position.

(a.) To the extent these questions are directed to resolution of tax amounts paid by Westmoreland to Montana and Big Horn County, the defendants' legal position has been set forth below.

(b.) To the extent the questions suggest that any form of monetary recovery may be available with respect to the Tribe's relationship with Shell Oil Company, the Court's July 23, 1993 order is dispositive.

(c.) To the extent these questions suggest that relief is available under 42 U.S.C. §1983, they must be answered negatively. First, the fourth amended complaint contains no claim under 42 U.S.C. §1983, and the deadline for requesting amendment has passed. Second, the Tribe is not a "citizen of the United States or other person" under section 1983. *Coeur d'Alene Tribe v. Idaho*, 798 F. Supp. 1443, 1452 (D. Idaho 1992); *See also White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 852 n.10 (9th Cir.) ("it is doubtful whether a tribe 'qua sovereign, would qualify as a 'citizen of the United States or other person' entitled to sue under §1983"), *cert. denied*, 479 U.S. 1060 (1987). Third, neither the State nor Director Robinson in his official capacity is a "person" against whom retroactive liability may be imposed under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64-65, 71 (1989). Fourth, retroactive relief against the State and Defendant Robinson in his official capacity is barred by the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 322, 340-45 (1979); *Edelman v. Jordan*, 415 U.S. 651, 674-77 (1974). Finally, the fourth amended complaint does not otherwise state a claim upon which relief may be granted

under section 1983. *E.g., Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661-63 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990).

D. What law governs resolution of the Tribe and United States' unjust enrichment claims?

1. *Tribe's and United States' Position*. The causes of action of the Tribe and the United States based on restitution or unjust enrichment are federal claims which may borrow from state law. *Franklin v. Gwinnett County Public School*, ___ U.S. ___, 112 S. Ct. 1028, 1035, 117 L.Ed 2d 208, 216-220 (1992); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979); *Board of County Comm'ners of Jackson County v. United States*, 308 U.S. 343, 350-351 (1939); *City of New Orleans v. United States*, 371 F.2d 21 (5th Cir. 1967), *cert. denied*, 387 U.S. 949; December 26, 1990 Memorandum Opinion and Order at 9-11, 13, 15-16.

2. *Defendants' Position*. A federal common law right of restitution for unjust enrichment should not be implied under the Omnibus Mineral Leasing Act of 1938, 25 U.S.C. §§396a to 396g, the Supremacy Clause, U.S. Const. art. VI, cl. 2, or principles of tribal self-governance. The authority to create such law is quite limited and extends to "essentially two categories: Those in which a federal rule of decision is 'necessary to protect uniquely federal interests[ ]' . . . and those in which Congress has given courts the power to develop substantive law." *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981); *Accord Mortgages, Inc. v. United States Dist. Ct.*, 934 F.2d 209, 213-14 (9th Cir. 1991) (per curiam). Neither instance is present here. However, even if a federal common law-based remedy of restitution may be implied, the

rule of decision should be supplied by reference to Montana law. *United States v. California*, 932 F.2d 1346, 1349 (9th Cir. 1991) ("[w]here there is no clear body of applicable federal common law, state law must be applied unless a "significant conflict between some federal policy or interest and the use of state law in the premises' is demonstrated"), *aff'd*, 113 S. Ct. 1784 (1993); *accord First Interstate Bank v. S.B.A.*, 868 F.2d 341, 343 n.3 (9th Cir. 1989); *United States v. California*, 665 F.2d 914, 917 (9th Cir. 1980).

E. What are the substantive elements of a claim for unjust enrichment with reference to the restitution relief sought here?

1. *Tribe's and United States' Position*. The substantive elements of a claim for restitution or unjust enrichment are:

(i) a wrongful act;

(ii) specific property acquired by the wrongdoer traceable to the wrongful act; and

(iii) a reason, in equity and fairness, why the person holding the property should not be allowed to keep it.

December 26, 1990 Memorandum Opinion and Order at 15, citing *Alsco-Harvard Fraud Litigation*, 523 F. Supp. 790, 806-807 (D.D.C. 1981). *See also, Schaeffer v. Miller*, 41 Mont. 417, 423, 109 P. 970, 973 (1910). These elements are the same for both the assumpsit (or quasi-contract) action and an action to impose a constructive trust. The two actions differ in terms of remedy; assumpsit (or quasi-contract) leads to a money judgment whereas the constructive trust remedy is directed to a specific res in the

defendant's possession. December 26, 1990 Memorandum Opinion and Order at 4-5.

Neither the assumpsit nor constructive trust actions requires that the plaintiff have had an entitlement to the property when received by the defendant or that the defendant have an independent legal obligation to turn the funds over to the plaintiff. To prevail, the Tribe and the United States simply must show it would give offense to equity and good conscience to allow Montana and Big Horn County to retain the coal taxes they illegally imposed and collected at the Tribe's expense. *Crow III; Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (affirming an award to an Indian tribe of state taxes illegally imposed on purchasers of tribal timber plus prejudgment interest); December 26, 1990 Memorandum Opinion and Order at 13-17.

2. *Defendants' Position*. The substantive predicates justifying the creation of a quasi-contractual obligation or a constructive trust for unjust enrichment are the same, and both forms of restitution are viewed as equitable in nature under Montana law. *E.g., Mason v. Madson*, 90 Mont. 489, 498, 4 P.2d 475, 477 (1931); *Eisenburg v. Goldsmith*, 42 Mont. 563, 577, 113 P. 1127, 1131 (1911); *Lewis v. Lindsay*, 19 Mont. 422, 439, 48 P. 765, 772 (1897). These remedies differ because an action based in quasi-contract, or assumpsit, "leads to a simple money judgment" (I George E. Palmer, *The Law of Restitution* §1.3 (1978)), while the constructive trust remedy is directed to a specific res in the defendant's possession. Unjust enrichment is shown "'by any legal evidence . . . that the defendant has received or obtained possession of the

money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff.' " *Schaeffer v. Miller*, 41 Mont. 417, 423, 109 P. 970, 973 (1910). Two necessary elements of such a claim, however, are proof that the plaintiff had an entitlement to the funds when received by the defendant and that the defendant otherwise has an obligation to tender the funds over to the plaintiff. *Schaeffer*, 41 Mont. at 424, 109 P. at 973; *accord McFarland v. Stillwater County*, 109 Mont. 544, 551, 98 P. 321, 323 (1940); *Valley County v. Thomas*, 109 Mont. 345, 381, 97 P.2d 345, 364 (1939). Because the assumpsit and constructive trust remedies are equitable, they are unavailable if an adequate remedy at law exists, or existed, through which the amounts at issue have been recovered. *See, e.g., Meyer v. Lemley*, 86 Mont. 83, 92, 282 P. 268, 271 (1929); *Philbrick v. American Bank & Trust Co.*, 58 Mont. 376, 387, 193 P. 59, 62 (1920); *Dunne v. Yard*, 52 Mont. 24, 31, 155 P.2d 273, 275 (1916). The same principles apply even if non-Montana decisional authority supplies the rule of decision. *E.g., U.S. v. California*, ___ U.S. ___, 113 S.Ct. 1784 (1993); *Niagara Mohawk Power Corp. v. Bankers Trust Co.*, 791 F.2d 242, 244-45 (2d Cir. 1986); *Van-Tex, Inc. v. Pierce*, 703 F.2d 891, 897 (5th Cir. 1983); *S.S. Silverblatt, Inc. v. East Harlem Pilot Block-Building & Housing Dev. Fund Co.*, 608 F.2d 28, 41 (2d Cir. 1979); *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370, 381-82 (D.C. Cir. 1976); *Knighton v. Texaco Producing, Inc.*, 762 F. Supp. 686, 693 (W.D. La. 1991); *F.D.I.C. v. British-American Corp.*, 755 F. Supp. 1314, 1324 (E.D.N.C. 1991); *East River Savings Bank v. Secretary of Housing & Urban Dev.*, 702 F. Supp. 448, 455 (S.D.N.Y. 1988); *Taylor Woodrow Blitman Constr. Co. v. Southfield Gardens Co.*, 534 F. Supp. 340, 348 (D.

Mass. 1982); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 704 (E.D. Pa. 1973); *D.C. Trautman Co. v. Fargo Excavating Co.*, 380 N.W.2d 644, 645-46 (N.D. 1986); *City of Norfolk v. Norfolk County*, 91 S.E. 820, 825-26 (Va. 1917).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants.	)	No. CV-78-110-BLG-JDS Volume I

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for trial in open court before the HONORABLE JACK D. SHANSTROM, United States District Judge, on April 18, 1994.

APPEARANCES

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[p. 54] Q. Referring to the first question, what is your conclusion regarding the question of whether Montana and Big Horn County collects sufficient revenues to cover governmental costs associated with the Westmoreland mine, excluding the severance and gross proceeds tax revenues on Crow Coal?

A From my analysis, I concluded that taxes from other sources than Crow Coal associated with the mine more than adequately cover costs associated with the mining operation, in fact substantially exceeds the costs directly associated with the mining operation.

Q Would you refer, please, to Figure 1.1 of your report and describe what that bar graph shows?

A Yes. Figure 1.1 makes the comparison between taxes earned on the mining activity at Absaloka, other than on Crow Coal, and compares it to estimates of

expenditures by the government, the State and local government, associated with mining operations.

THE COURT: 1.1?

THE WITNESS: 1.1 at page 4, Your Honor.

The column to the far left, labeled taxes earned, demonstrates the amount of money generated through various taxes by the mining operation at Absaloka. I estimated a [p. 55] total of 29.3 million had been collected between 1976 and 1986. These include such things as the severance and gross proceeds taxes on state-owned coal mine by the – at the Absaloka mine; royalties to the State on that coal, as well as property taxes and income taxes paid by both Westmoreland and its mining contractor, Morrison-Knudsen, as well as income taxes generated by those employees of the mine who pay such taxes. You see the shadings indicate the various components of that. The gray is coal related taxes, and royalties, again, this is on coal other than Crow that's mined at this operation.

The cross-hatched area is other mine related taxes, those would be chiefly property taxes on equipment and buildings and so on.

And the final component, in white, are the income taxes generated by both the workers at the mine and secondary workers that I estimated to be associated with the mining operation. So that totals to 29.3 million.

The next two groups of bars are estimates of expenditures that are clearly directly related to mining operations. The one to the far right includes just two components and totals one million dollars. One of those components is the State's estimate of what it costs each

year to regulate mining – to regulate the Westmoreland Absaloka mine, that is to have mine inspectors come by and [p. 56] inspect the operations to do what necessary work there is during the course of a year to keep the mine operating according to state and federal standards.

The other component of that is chiefly capital expenditures which have been amortized to cover the expenses related to a road that was financed by the State that was deemed necessary for the mining operation.

The middle bar, then, adds some additional potential expenditures to that, which may be directly related to the mine, though not as clearly so as the first two. The other mine-related taxes totaled $3.9 million, bringing the total of that middle bar to $4.9. That $3.9 million includes – is based on an estimate of how much on a per capita basis any additional workers that the mine has generated, I should say any additional people, that have come to Big Horn County as a result of the mining operation, have generated in terms of demands for government services.

So we come up with a per capita cost to providing services based on the budgets of the local governments, we assume that a certain number of people have come to the county because of the mine, and the additional costs and burdens of those people, then, are costed out and included here to establish the additional $3.9 million.

Now, many of the workers in the case of the Absaloka mine were already located on or near the [p. 57] reservation, many of them are in fact members of the Crow Tribe. So unlike other places, we saw relatively minor migration into the area as the mining operation began and continued.

So as you can see looking across these various estimates, the estimate of taxes earned at the Westmoreland mine by the state and local governments, other than those related to Crow Coal specifically, are $29.3 million compared to somewhere between $1 million and $4.9 million dollars. So there's quite an excess of taxes, revenues generated against costs directly related to mining activity.

Q Now, did you look for any evidence of what is called a boom and bust syndrome with regard to the Westmoreland mine?

A Yes, I did.

Q What did you find in that regard? First, describe more eloquently than I did what boom and bust means to you?

A Yes. One major concern by state and local governments, particularly in the early '70's, and particularly by western state and local governments, was the boom and bust cycle that had been observed in the past in the west, when economic development occurred very rapidly, bringing in lots and lots of new citizens demanding additional services beyond what existing infrastructure [p. 58] could provide, but then after a fairly short period of time, that economic development would cease, the mine would be tapped out, whatever other operations were associated would be gone, and the local and state governments would be left with the tab. They would still had [sic] these very large expenditures and infrastructure that they had built, but no people to provide services to, and more importantly, a limited tax base to cover the remaining costs associated with them.

In fact, that's what, in many instances, precipitated the interest on the part of state governments to impose greater taxes on energy production, coal in particular, was to help both limit the rapid growth and to finance the demands for services that would be associated with that growth.

There are lots of examples across the west of where that kind of rapid growth took place. A good example is Sheridan, Wyoming, in which population increased dramatically as a result of mining, but in fact wasn't incorporated to include any of the specific mines. So while they saw great population growth, it saw no tremendous increase in the tax base, and as a consequence, found itself in difficult times unable to meet its expenses.

In the case of Absaloka mine, we saw nothing like that. We saw no great influx of population into Big Horn [p. 59] County or to the reservation. We saw not particularly rapid growth in population associated with the mining operation. We saw no, – as a result no substantial demand, increase in demand, for services, that is, not new schools and hospitals were not required because of population associated with the mine. Apart from the one road I mentioned before, there was little to do in the way of the standard kinds of infrastructure you may think of, like roads and highways and bridges and so on, public buildings.

And so as a consequence while the boom cycle and bust cycle are sometimes a reality in the west and subject to real concern, in the case of the Absaloka mine, none of that kind of problem arose and put any kind of burden on the State or local government.

Q I'd like to refer you to Tables 2.1 and 2.2 on pages 17 and 18 of the report. Would you describe what is shown on those tables relative to the testimony you just gave?

A Yes. At page 17, Table 2.1, I have compared coal production over time, over the period 1972 to 1992 in Montana and Wyoming, and then for selected counties, which either were the location of most of the mining activity, or a lot of increased population related to mining activity.

As you can see, in Big Horn County, as you probably already know quite well, production increased [p. 60] dramatically from 800,000 tons in 1972 to over 22 million tons in 1992. The production growth over the period '73 to '92 was over 400 percent in Big Horn County.

There were other counties, however, who saw even more dramatic growth than that. In Wyoming, for example, Campbell County saw growth production from 1,623,000 tons in 1972 to over 159,000,000 tons by 1992. So there has been quite dramatic growth in lots of counties.

In contrast, in Wyoming, Sheridan County, has actually seen a slight increase since 1972, but then a dramatic reduction. So that today, whereas in 1992, rather, production is only 71,000 tons compared to 463,000 tons in 1972.

The next table that you referred to, Table 2.2 at page 18, looks at population growth in those same jurisdictions, both the State and the counties regarding – involved in coal production. And several interesting things should be noted from this table.

First, as you can see looking at the Big Horn County row, Big Horn County's population grew by 10 percent between the '70 and '80 census. And then by only 2.2 percent in the '80 and '90 census. Keep in mind, as I point out in the previous table, coal production increased dramatically from under a million tons per year to over 22 million tons a year over that period.

[p. 61] So despite the dramatic growth in coal production, we are not seeing what I would term at least dramatic growth in population over either the '70-'80 period and certainly not the '80 to '90 period.

In contrast, if you look at some of the other coal counties, you will see much more dramatic growth in population. In Rosebud County, Montana, population increased by 64 percent between '70 and '80. And Campbell County, Wyoming, which showed that tremendous increase in production, we see population going growing by 88 percent. And in Sheridan, Wyoming, although coal production didn't increase, we saw a 40 percent increase in population and that has to do with the fact that miners working at the mines in the surrounding areas, oftentimes prefer to live in Sheridan, Wyoming.

In fact, even a fair number of mine workers at the Absaloka mine, the Westmoreland mine, and the ceded area, live in Sheridan, as so do workers at the NERCO Spring Creek mine and I believe at the Peabody mine, or Decker mine, rather, as well.

The other important point I think to raise here, going back to Big Horn County, is you will see in the middle of the page a breakdown by race, between white and non-white. We couldn't break it down any further with this

particular census data, but non-white in this instance is [p. 62] primarily native American, and among native Americans, principally Crow, although the Northern Cheyenne, of course, as well and others.

But here you can see that although the overall Big Horn County population, as I pointed out, increased by 10 percent, 10.3 percent, between '70 and '80, what really was going on was that the Native American population, or the non-white population here, was growing very rapidly at 31.6 percent. But that the white population in Big Horn County actually fell by almost 4 percent over that period.

So that the growth we are observing in Big Horn County in that period, '70, '80, is clearly not mine related but more related to the fact that the Indian population in general, and the Crow population in particular, were growing at a fairly rapid rate having nothing to do with mining operations. So there clearly has been no population growth in the Big Horn County that can be attributed to the Absaloka mining operation.

Q Now, in this connection, did you also look what happened to the mill rate levies in Big Horn County during this period?

A Yes. We took a look at the mill rates over the same period of time as a means of gauging whether or not the county was in fact suffering any difficulties in meeting its obligations, in meeting the costs of providing services to [p. 63] its citizens. If, in fact, there was a tremendous increase in demand for those services, without an adequate increase in the tax base, one would

expect to see the mill rates increasing in order to cover those costs.

What we see instead is over most of the period, relatively flat or even falling mill rates, which suggests the opposite was the case. As demand for services were not increasing rapidly, but at the same time the tax base was, such that there doesn't appear to be a substantial financial burden placed on Big Horn County in particular.

As you can see at page 11 of the report, in 1973 the overall mill levy in Big Horn County was 107.86, and that by 1987 the mill levy had decreased to 91. During the same period, the Consumer Price Index, which is a useful indicator of inflation, rose at 156 percent, suggesting that while costs were on the rise overall, unrelated to growth, the State – the county, rather, was able to lower its tax rate.

I should also point out that although this is not presented here, it was presented in my previous report in 1983, that among counties of similar size to Big Horn County, and size being measured here in terms of either population or land area, that Big Horn County's mill rates were among the lowest. That also suggests to me they were not financially strapped as a result of rapid growth related [p. 64] to mining operations. I think that's further evidence of that conclusion.

Q Would you refer, please, to Table 2.4, and describe what's shown on that, as well as 2.5?

A Yes. Table 2.4 at page 20 is the detailed breakdown of that $29 million dollar figure that I reviewed in the first Figure, which identifies how much tax and royalty revenue was generated by the Westmoreland mine, other than on Crow Coal. As you can see, the final number at the far right column at the bottom is that $29 million dollars that I mentioned.

You can see in this table what the – more clearly what the piece parts are to that number. If you go over to the far left-hand side, you will see the breakdown, and let me go through it with you quickly.

Under the coal-related components of these revenues, we included the severance tax, here, again, on state coal only. That is, only coal being mined on state lands at the Absaloka mine. We included gross proceeds taxes, but, again, limited to those related to the state lands under the mining operations.

And we included royalties being generated by the coal production on state lands for the state.

We also included the revenues from the resource indemnity trust tax, which applies to all coal. The Tribe [p. 65] has not attempted to claim that tax, and that tax continues to be collected and was collected on all coal, including theirs, and will continue to be.

And then finally, we included the Service Mining Control Reclamation Act fees that the federal government imposes, but then shares with the local governments, state governments. Here, again, we limited those revenues only to those generated by the state coal, not the Crow Coal.

The total for those coal related revenues, total $20.7, almost $20.8 million dollars. So that's clearly the largest component of the total taxes earned unrelated to Crow Coal from the mining operation.

The next component are what we refer to as mine-related revenues. There are three components there.

The first is the income taxes paid by Westmoreland to the State. Those total to be a little bit over – almost $1.5 million, just under $1.5 million over this period, '76 to '86. We also included Westmoreland's non-coal property taxes paid to the – paid to the State, or actually initially, at least, to the county government. Those, again, are for things like machines and equipment and shelter and other structures.

The final component of that is the Morrison-Knudsen property taxes. Morrison-Knudsen is the – or was the operator for Westmoreland at the mine, and they [p. 66] also paid for their property into the property taxes collected by the county. Those are included here as well. The second component, other than mine-related, totals to about $5.2 million dollars. $5,171,637.

Q What about income taxes paid by Morrison-Knudsen?

A We were unable to identify those. We believe that some were in fact paid, but since I couldn't establish how much, we did not include those in these calculations. To that extent it understates the revenues generated.

The final component is mine workers, and these are broken into 2 components. The first is miners' income taxes, and then the second is secondary income taxes.

The first refers to the income taxes paid by mine workers, who work at the mine, to the State. We excluded from the number of miners who pay those taxes members of the Tribe who live and work on the reservation who do not pay those, but those who live off the reservation are included.

The final component is what we refer to again as the secondary income taxes. Those are income taxes paid by workers or people who we have identified being related to the mining operation. That is that they are there, they are earning their incomes, as a result of the mine being operated there. We used what economists and planners refer to as a multiplier to establish how many secondary or indirect workers are associated with direct workers at a [p. 67] particular – in a particular industry, so while there may be – for every one mine worker there may be another half of a worker or another two workers doing other things related to the mining operation; servicing it, for example, outside contractors, or providers of goods and services, restaurant operators, a whole range of providers within the economy.

So we took an estimate of how many of those people and what their average income might be and what in turn they would generate in terms of income taxes to the State. That amounted to the $1.4 million you see under the total column.

So those three broader components totaled to the $29.3 million we show here.

Q Then would you explain the table on the next page, Table 2.5?

A Yes. 2.5, in fact, is the explanation of those last two components of the number of coal miners and the number of secondary workers that we estimated were related to the mining operation, and then how much each of those workers and secondary workers generated in terms of income tax.

Column 2 is the average miner's salary, the average salary that each miner was earning. We based that on a state-wide average of coal worker income. We adjusted it in each of these years for inflation, that's what the CPI [p. 68] index and the column numbered 1 is there for.

The number of coal miners associated with the mine are presented in Column 3, and there were 122 in 1976. It grew to as many as 193 by 1979, and then has been falling since to, to a total – over the period fell at least down to 104 by 1986.

We then estimated the income generated by these miners simply by multiplying the average miner's salary times the number of workers. So that as you see in Column 4, we estimate that in 1976 $2,100,139 were generated in income by those miners, and that's the product of the $17,214 per worker times the 122 coal miners.

Then Column 5 is the estimated income tax on that income. And there we looked to both the average tax rate that was indicated in a Montana Coal Council report on coal miners, and by reference to the All State's Tax Handbook, which indicates average tax rates, by state, for various groups of taxpayers. As you can see, using the 1976 example, that resulted in about $100,419 in income taxes to the State in 1976.

Then Column 6 is the number of secondary workers. As I explained before, the number of workers that were generated in addition to those working directly at the mine.

Again, using multipliers, here we took a multiplier of 1.7151, which is noted at footnote 5 to this [p. 69] table, and that's based on a state level input-output model that the Department of Commerce, at the federal level, puts together on a fairly frequent basis.

So using that multiplier and multiplying that times the number of coal miners, we estimated there were 209 secondary, or indirect, workers. For example, 122 times 1.7151 would generate 209 workers. We then took average workers salary for those workers based on the average Montana salaries, as reported in the U.S. Census in '90, and then, using that same inflator, adjusted that value to each of these years, so that in 1976, the average salary, according to that number, would be $7,603, and by 1986, that salary would have reached $14,644. You can see coal miners are paid reasonably well relative to the average in the state over this period.

Then to estimate the income tax generated by the secondary workers, we first calculate the total income, which is the number of secondary workers times their average income, and that yields Column 8. So that 209 times $7,603 would give us the $1,590,799. Then applying the same tax rates we applied in Column 4, or Column 5, rather, we would then generate the income tax paid in 1976, that would total $76,064.

Following that process through each year, '76 to '86, we then estimated that there would be a total of [p. 70]

$3,328,142 in income taxes. And that breaks out, as you can see right above that, to $1,434,424 by secondary workers, and $1,893,719 by the mine workers themselves.

Q Was that information then utilized in Table 2.4?

A Yes, that was, as I indicated a minute ago, those numbers would match. The numbers you see in Table 2.4 in the total column for miners' income taxes, and secondary income taxes, the $1,893,719 at the bottom of Column 5 in Table 2.5 is the same number you will see in the total column of Table 2.4 for miners' income taxes.

Q In the course of your analysis of this issue, did you also consider environmental risks and potential liabilities associated with the Westmoreland mine?

A Yes.

Q And what were your conclusions?

A I concluded that there were no substantial additional quantifiable risks to this mining operation that weren't already accounted for in a number of other ways.

First of all, as I showed in Table 2.4, one of the taxes collected by the State on all coal, including Crow, is the resource indemnity tax. That tax was designed to provide the State with funds to deal with environmental problems that might arise at a mine, or after a mine is closed. So there is one source of money already being collected to cover the risks associated with mining [p. 71] operations.

In addition, both the state and the federal government require the mine operators post substantial bonds before operating their mines. In order to cover the potential environmental costs that might arise. So there's there

is a second form of insurance to cover the costs that might arise from the risks of the mining operations.

And, finally, the Absaloka mine, as Mr. Presley probably knows too well, is regulated at several different levels of government. Not only are they visited by state inspectors, they are visited by federal inspectors and visited by Crow inspectors. So that they get their share of regulatory review and inspections. As a result, have had no serious violations reported in their operations.

And I should also note that Montana does a very impressive job of monitoring its mining operations. It has among the lowest levels of citation rates in the country, particularly among western states. So it doesn't appear to me that there is any substantial risks left uncovered associated with the mining operation.

Q You mentioned the regulation of the Westmoreland mine, and I just wanted to go back for a minute to the bar graph, which is I guess reproduced twice in your report, Figure 1.2 and also 2.1.

Would you describe, again, the cost that you [p. 72] identified as mine regulation costs that are shown in the middle column and the right-hand column on that bar graph?

A Yes. Again, the bar graph includes two components totaling to approximately a million dollars. One is associated with the construction of infrastructure of roads to the mine that the State incurred. And the second component, which is roughly equal in size, are costs associated with regulating the mine that the State has

identified, that they identified previously, I believe, in the 1993 proceeding.

Q So does that assume that the costs incurred by the State for mine regulation come from state funds?

A Yes. I have not made any adjustments for the likelihood that some state regulatory costs are subsidized by the federal government. The SMCRA tax is often used to help finance state regulation of mining operations. But I did not make any adjustments for that.

Q So this assumes full costs borne by state funds?

A That's correct.

Q Finally, with regard to this issue, would you direct your attention, please, to Table 2.3 on page 19, and describe that for us?

A Yes, Table 2.3 at page 19 compares the amount of money that Big Horn County contributed to the Montana School Equalization Program between 1977 and 1987.

[p. 73] The column number 1 is the Big Horn County collections for school equalization, this is the elementary school and high school taxes imposed by the direction of the State, which are collected, and then reallocated or redistributed to counties and school districts, depending on whether or not they are deficient in having funds necessary to meet certain spending requirements based on class size or number of students enrolled in various school districts.

And what this table shows is, in fact, owing to the large tax base in Big Horn County, that the tax base is largely driven by the value of coal produced within the

county, that in most years the Big Horn County has actually sent money back to the State; that is, they have collected more than the State requires them to cover the costs of education, and as a result these monies go back to the State for reallocation to districts who aren't able to collect sufficient funds using the State level – the State set level of tax rates, of mill rates.

As you can see, in some years more than 50 percent of the monies collected went back to the State. I think over the entire period, and these number should have been included in the table, that over this period, '77 though '87, the total amount that was recaptured by the State, according to these numbers, was 33.6 percent. That's based on a total of roughly $51.4 million in collections, [p. 74] that's the sum of Column 1, compared to the amount sent to the State, or recaptured by the State, which totals to around $17.3 million dollars.

I should note, in looking at the State's expert's report on this subject, they came out with slightly different numbers. I have gone back and looked at our sources, my numbers match those sources, but the State's experts' reports numbers match their sources. So I couldn't reconcile at this point why the difference, but despite the differences in some of the dollar amounts, we are not talking about a substantial differences [sic] in the share of funds collected that went back to the State.

Again, using the numbers we relied on, we found that 33.6 percent went back to the State. Using the State's reports, it appeared that roughly 26 percent went back to the State.

I can't explain that yet, but the point is made in either case a substantial amount of the money does not stay within the county but in fact goes back to the State.

Q What do those numbers indicate with regard to the relative financial well-being of Big Horn County versus other counties in the state?

A Well, again, it indicates that because of this tax base, that Big Horn County is not financially strapped, it is actually able to generate more than it needs, at least [p. 75] at one level of education spending. As a consequence, ends up contributing to other districts.

In most years there were no more than I think three or four, maybe at most half dozen counties, that were in financial conditions good enough that they actually generated funds sufficient to send monies back to the State. So it's another indicator that the State has been financially – the county, rather, has been financially healthy over this period.

Q Have you determined two things, the amount of money that Westmoreland's taxes contributed to the State School Equalization Program, and of that total amount, how much was recaptured by the State?

A Yes. I believe those numbers are as follows: The total amount of gross proceeds taxes generated for these school purposes at the Westmoreland mine was roughly just above $5 million dollars, I believe. If in fact – that is the total amount was roughly $5 million dollars. Of that amount roughly $4 million, or $3.9 million, went to equalization.

Q You mean was recaptured by the State for equalization?

A Let me – I always confuse these numbers. I apologize. I'm sorry, roughly $5 million was in fact collected for school purposes. Of that $5 million, $3.9 [p. 76] million goes, I believe, into – recaptured by the State for other purposes.

Q For other areas?

A For other areas, right. That the State takes and spends in counties other that Big Horn.

Q Now, were the conclusions that you reached that you have testified here to this morning, and are as reflected in Chapter II of Exhibit 319, are those consistent with your previous report and testimony that was done for the 1984 trial?

A Yes.

* * *

[p. 86] Q Now, did you also, for purposes of comparison, make determinations or comparisons between the Westmoreland tax payments and payments received by Montana from other coal producers?

A Yes. Let me make sure I understand your question. Are you saying do we compare how much was collected in severance and/or gross proceeds from the Westmoreland mine compared to all other mines? Yes.

Q Yes. And would you show us where your report did this and describe those figures to us?

A Yes. I believe those are presented back up in the front of the report in several of the very early tables.

Yes, if you would refer to Table 1.2 at page 7. This table presents the 1994 value of the Constitutional Trust Fund that Montana established using the total payments made to the trust fund over time from all coal mines, and then applying the time-weighted returns reported by the Montana Board of Investments. So that, as you can see in Column 2, the total amount of money invested in the [p. 87] Constitutional Trust Fund between 1976 and 1993, totaled $497,589,524, and that, again, the Westmoreland payments that compared that, are $46,811,029.

If you look over to the far right, you will see that the total benefits to the State that is applying both the investments and the returns on those investments, the total returns, the total amount, as of the end of 1993, was $1,033,156,423.

If you apply the same returns to the Westmoreland payments, they comprise $262,701,210 of that total. So they represent roughly 25 percent of that total, if you can divide – if you compare the $262.7 million to the 1 billion, 33 million, that represents – Westmoreland's payments represents with interest, or with return, represent just over 25 percent.

Q And then what's portrayed on Table 1.3?

A Table 1.3 looks at all the severance taxes paid, regardless whether or not those taxes went into the permanent trust fund or went to other purposes, that is, went to other funds, went to meet the coal impact funds, went to meet other demands of the State.

So the numbers that show up in Column 2 of this table are, in fact, the total severance taxes paid to the State in each of those years from 1976 through 1993, and, again, you will see that the totals – the total over this [p. 88] period in severance taxes paid is over a billion dollars. It is $1,127,306,983.

Accounting for the investment return on that money over time through 1993, the cumulative balance is over 3 billion dollars. Almost 4 in fact. The total as you can see to the far right in Column 6, $3,816,587,866. Again, the Westmoreland payments and interest amount to only – only, it is hard to say that here, but $262,701,210. That represents as a share of that total value to the State of over 3 billion dollars of just under 7 percent. So, again, comparing the $262.7 million to the $3,816 million dollars in total benefits to the State, the Westmoreland component represents just under 7 percent.

THE COURT: We will adjourn for the noon hour here.

(Recess.)

* * *

[p. 120] Q (by Mr. Pelcyger:) Speaking in general terms, Dr. Berkman, just now dealing with the Montana tax, not the double tax, but the size of Montana's tax in your opinion adversely affect the development of Crow Coal?

A Yes.

[p. 121] MR. SMITH: I was going to object before the witness' response.

MR. PELCYGER: All these matters were covered in the original report about the marketability of report. I could go through a series of questions about that.

THE COURT: I will overrule the objection.

MR. PELCYGER: Would you read the question?

(Question read.)

A Yes, I do.

Q (By Mr. Pelcyger:) Would you amplify that, please?

A Yes. The Montana's severance tax was, I should say, during that period, quite high. It was a 30 percent rate combined with the gross proceeds tax, which made it among the highest anywhere, and certainly substantially higher that the primary competition for Montana coal, which is Wyoming. Both states cover the Powder River Basin, so they were in direct competition with each other for production.

The fact that mining investors had a choice between Montana and Wyoming and saw much higher tax facing them in Montana, clearly had an effect on where they decided to locate their mines and produce their coal.

Q Now, in your opinion would the Tribe have been in a better position to market its coal if it was able to [p. 122] control the tax rate on that coal?

A Yes, very definitely. Again, the tax has an important effect on the ability of the owners to sell their coal. It affects the price of the coal and, therefore, the demand for

the coal. Had the Tribe been able to secure a lower tax, had it wanted to promote additional production, it could have, giving it much greater flexibility in regulating and developing their coal resources.

The State of Montana has recognized this over time by its fairly recent decision to reduce the coal tax rate in Montana.

Q Now, of course, the Ninth Circuit and Supreme Court ruled in 1987 and 1988 that Montana tax was invalid. Would you describe how the market had changed within that period?

A Yes. There was a fairly dramatic change in coal markets, particularly Powder River Basin coal markets, between the mid-'70's, when the severance tax was first imposed and when the Crow initially attempted to impose their own, and the late '80's when the Tribe was finally able to impose its own tax independent of the state.

During the early and mid-'70's we were experiencing a tremendous boom in demand for Powder River Basin coal. Several things – several conditions, though, were responsible for that taking place. For example, the [p. 123] Clean Air Act Amendment of 1972 put a real premium on low sulfur coals. The Powder River Basin a major source of low sulfur coal. There was an immediate interest in further production of Powder River Basin coals in Montana and Wyoming for that reason.

In addition, OPEC imposed its embargo in the early '70's, and that was followed a few years later by the Iranian embargo, and as a result, oil prices and natural

gas prices went up dramatically, making coal a far more attractive fuel for utilities in particular during that period, which prompted further interest in demand for coal in general, and Powder River Basin coal in particular, because it is actually very low cost to extract, in addition to its low sulfur properties.

We also saw continued increased demand for electricity particularly in the more rapidly growing western states, and the federal government, also, imposed additional regulations in the late '70's, mid to late '70's restricting utilities from further use of natural gas, which put a further benefit to coal in general, and PRB coal in particular.

So we saw a great interest in investing in western coal and Powder River coal, and a great number of new mines opened up in that stretch in between the mid '70's and early '80's. But by the late '80 things had changed a [p. 124] bit. The oil prices, of course, fell; natural gas prices were much higher than people anticipated, leading to lower natural gas prices, and to a removal of the restrictions of federal government had imposed on utilities to use natural gas.

So there was much greater competition across fuels making coal less attractive. By the late '70's the eastern coal interest had prevailed on Congress to amend the Clean Air Act amendment, that was done actually in 1977, which served to protect eastern coal by limiting the premium for low sulfur western coals by forcing utilities to add scrubbers to plants to clean emissions before they entered the atmosphere.

Once you force the utilities to use scrubbers, their interest in using low sulfur coal is much limited because there is no points, they don't save anything by going to low sulfur coals if they have to clean up the air anyway. They would have used low sulfur coals to avoid having to build expensive scrubbing equipment. So things began to change. A lot of the premiums slowly began to be erode [sic] by the late '80's, when the Crow finally had the opportunity to be in complete control of their coal resources through taxation, the market was a much tougher one to operate in.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants.	)	No. CV-78-110-BLG-JDS Volume II

TRANSCRIPT OF PROCEEDINGS

Trial in the above-entitled matter resumed for trial in open court before the HONORABLE JACK D. SHANSTROM, United States District Judge, on April 19, 1994.

* * *

[p. 186] MR. ROSS: You may answer.

THE WITNESS [C. Joseph Presley]: In 1970 the Bureau of Indian Affairs advertised a number of coal tracts out in the ceded strip, advertised those for competitive bids. Westmoreland Resources was the successful bidder on three of those tracts, Tracts 1, 2, and 3.

Q And (By Mr. Ross:) Did Westmoreland subsequently enter into an agreement with Westmoreland on Tracts 2 and 3?

A With the Tribe?

Q Yes.

A Yes. Two years later, June of '72, we converted two of the prospecting permits to coal leases. The prospecting permits gave us the right to convert them to coal leases.

MR. ROSS: Your Honor, may I approach the bench to present the witness with an exhibit?

THE COURT: Yes.

Q (By Mr. Ross:) I'll ask you to refer to Defendants' Exhibit 532 and ask you to identify that [p. 187] exhibit.

A This exhibit is the 1972 coal lease for Tract 3 and Tract 2. They are dated June 6, 1972.

Q And were those 1972 leases approved by the Department of Interior?

A Yes, or an agent of the Secretary.

Q When those leases were negotiated and agreed upon in 1972, Montana's 30 percent coal tax didn't exist; is that right?

A That's correct.

Q What were the monetary terms or economic benefits that Westmoreland agreed to provide the Tribe under those 1972 leases?

A Well, when we got – when we were the successful bidder on the prospecting permits in 1970, I believe we paid $350,000 for Tract 3, and around $150,000 for Tract 2.

Then the 1972 leases provide that we pay the Tribe annual lease rental of a dollar an acre, and that we pay the Tribe 17 and a half cents a ton for every ton of coal that was mined.

Q Did those 1972 leases include any provision for paying the Tribe any sort of tax?

A No.

Q After you entered into the 1972 leases with the Tribe, what did Westmoreland proceed to do?

[p. 188] A Almost simultaneously with signing the coal leases we entered into 20-year long term contracts with four utilities for 4 million tons per year. That was on June 15, '72, I believe.

Then we proceeded to construct a 38-mile rail spur from our mine to Hysham, Montana. We commenced the construction of the plant facilities, the coal handling facilities, and we began erecting a 75 cubic yard drag line.

Q Did the contracts that you entered into with the utilities provide that you could pass on taxes which you thought were valid to the utility customer?

A Our contract provided that we could pass on any new laws or changes or different interpretations of existing laws.

It would only be if there was any valid existing tax ordinance could we pass it on to the Tribe, or to the customer, excuse me.

Q You mentioned that you proceeded to build a railroad and develop the mine. Were there a number of permits and approvals that Westmoreland needed to obtain, in order to develop its mine?

A Yes.

Q I'd ask you to refer, if you would, to Defendants' Exhibit 353.

A Okay.

[p. 189] Q Could you identify Exhibit 353, please?

A This is part of a response, or answers, to a set of interrogatories from someone, I'm not sure which, but it lists the various permits that Westmoreland Resources had to get in order to either develop or operate the coal mine.

Q And were most of those permits obtained from the State of Montana?

A Yes, all but two. One was from the City of Billings, and one was from the Department of Interior.

Q After Westmoreland entered into the utility contracts and received its permits to develop its mine, what happened then?

A Well, we proceeded to construct the facilities necessary to develop the mine.

Q Was there any attempt by the Tribe to stop your mining development?

A There was an effort made by the Tribe to increase their economic benefits from our coal mining, starting in

late 1973. The energy crisis had just hit, oil prices had gone up, and the Tribe felt the 17 and a half cents a ton that they were receiving under the lease, was not enough economic benefit.

So they created a committee, a mineral committee. The committee negotiated, approached Westmoreland Resources and said that they wanted more economic benefits.

[p. 190] Westmoreland Resources met with them in early 1974 and reached a consensus with the mineral committee. We even had a memorandum of understanding on what the new economic benefits would be.

The secretary of the mineral committee signed that, understanding that, subsequently all members of the mineral committee backed down, and would not – no longer supported the memorandum of understanding.

Q So that memorandum with the mineral committee never was fully agreed upon?

A No.

Q Did the Tribe attempt to void Westmoreland's lease?

A About 14 days after we shipped our first train of coal, the Crow Tribe petitioned the Secretary of Interior to void our lease.

Q And what was Westmoreland's response after that attempt to void the lease?

A We continued negotiations with the Tribe, and eventually, on of [sic] November 26th, I believe it is, 1974,

signed amended leases for those – Tract 2 and Tract 3. Those new leases included a lot more economic benefits for the Tribe.

Q Was money the principal subject of those 1974 negotiations and agreements?

[p. 191] A Yes.

Q Would you please refer to Defendants' Exhibit 534 and identify that document?

A That's a settlement agreement that was signed at the same time the amended coal leases were signed.

Q And would you please refer to Defendants' Exhibit 533?

A Exhibit 533 is the amended coal mining lease for Tract 3, the tract that we were developing.

Q And what is the date on that amendment?

A Amended lease, it's dated November 26, 1974.

Q And in what ways did that 1974 amended lease change the terms of the 1972 lease?

A Well, first, we paid the Tribe $1,128,000 and a bonus and advanced royalties.

THE COURT: Paid a million what?

THE WITNESS: $1,128,000. This was a $500,000 of the payment was a bonus, $628,000 was advanced royalties that could be recouped – offset from production royalties, I believe, starting in 1985, something like that.

In addition to that, we agreed to pay the Tribe 6 percent, or .35 cents a ton, whichever is greater, on the

original 77 million tons that we had sold to the original customers, the customer for 20 years.

On any new sales we agreed to pay the Tribe 8 [p. 192] percent of the F.O.B. mine price, or .40 cents per ton, whichever was greater. And that 8 percent royalty component would be subject to royalty renegotiation each ten years, and it has been renegotiated since that time.

In addition to that, we agreed to be at 10 million tons by 1982 on Tract 3. We had ordered another drag line and anticipated having enough business to meet that 10 million ton commitment.

If we didn't meet the 10 million ton commitment, the lease provides that we would pay them the prevailing royalty on half of any shortfall from the 10 million tons.

Q (By Mr. Ross:) And what was Westmoreland's view of the royalty payments and other economic benefits that it paid to the Tribe under that 1974 lease amendment?

A We viewed it as all of the economic benefits that we could afford to pay. We and our utility customers.

Q And how did it compare with compensation of royalties under other existing contracts?

A At that time I think it was by far the highest royalty that was being paid in the nation. Federal royalties at that time were 17 and a half cents a ton, maybe 20 cents a ton.

Q Did the 1974 agreement between the Tribe and Westmoreland include any provision for Westmoreland to pay the Tribe any sort of tax?

[p. 193] A No.

Q Did Westmoreland believe that the Tribe might try to impose a tax on Westmoreland after that 1974 agreement?

A Well, I would say after the amended lease was executed, maybe a year later, or after the State passed their severance tax, we had some concern about double taxation.

Q But at the time the '74 agreement was negotiated, did you think the Tribe may try to also impose any sort of tax?

A No.

MR. PELCYGER: I object to that. It hasn't been established that Mr. Presley was in any kind of a position then to respond or to make – take policy positions on behalf of Westmoreland.

THE COURT: You can lay a foundation on that.

Q (By Mr. Ross:) Mr. Presley, are you aware of the terms of the 1974 negotiations?

A Yes.

Q And are you familiar with Westmoreland's position and understanding during those negotiations?

A Yes.

Q And, again, it's your understanding, as part of those negotiations that the Tribe would not try to impose a tax on Westmoreland right after those '74 agreements were [p. 194] negotiated?

A It's my understanding that in early '74, the possibility of maybe some kind of sharing of any tax reduction that might occur, might accrue to the benefit of the Tribe. But the Tribe rejected that, and opted for the economic benefits we settled on.

Q And in 1974, was your understanding that the benefits paid under the '74 agreement were the final economic benefits you would pay to the Tribe?

A Yes.

Q From 1974 to 1975, are you aware that Montana passed a new coal severance and gross proceeds tax in 1975?

A Yes.

Q And after Montana passed its coal taxes in 1975, did Westmoreland pay those taxes directly to the State of Montana?

A Yes.

Q And how frequently did you pay those taxes?

A Well, there were two taxes, the severance tax, the 30 percent severance tax, and the gross proceeds tax.

The severance tax was paid quarterly, 30 days after the end of each calendar quarter. And the gross proceeds tax was paid – it's basically a property tax, and half of it I think is paid on November 30th, and the other half is paid on May 30th of the following year.

[p. 195] Q And for how long, or over what period of time did Westmoreland pay the severance tax directly to the State of Montana?

A We paid the severance tax to the State through the third quarter of 1982, and the gross proceeds tax we paid through the first half of 1986 would be my guess.

Q And after that time how did you pay the taxes?

A We paid them to the federal court here in Billings. The severance tax, not the gross proceeds.

Q And why did you pay the severance tax into court?

A Well, in early 1972, I believe it was Bob Pelcyger or Tom Fredericks –

Q Did you say 1972?

A Excuse me, 1982, Bob Pelcyger, Tom Fredericks, approached George Miller, who is an attorney for us with Decker, Price, and Rhodes, about the possibility of joining the Tribe in petitioning the court to have the money paid into the federal court. I believe the Tribe's attorneys felt this might put pressure on the State to settle.

At that same time, I believe Tom Fredericks sent a draft of an amended tax code that he was proposing to submit, which would protect Westmoreland Resources from the thing we were concerned about, and that was double taxation.

George Miller, our attorney, asked me what I thought about it, and I told him I thought that we would be [p. 196] better off to get an amendment to the lease because a tax code could be changed at any quarterly council meeting in the future.

So, as a result of negotiations between George Miller and Bob Pelcyger and Tom Fredericks, I believe we reached an agreement on an '82 lease amendment.

Q Did you pay the severance tax into court pursuant to that '82 agreement?

A Following the execution of that agreement, we, I believe, Westmoreland and the Tribe, petitioned the court to have the money paid into court. And I believe in January of 1983, Judge Battin issued such an order.

Q So you paid the severance tax into court starting sometime in January, '83?

A Well, the fourth quarter payment for '82 would have been due on June 30th, and I think Judge Battin's order came out before that. So we paid the fourth quarter of '82 into the federal court.

Q And that was done pursuant to the '82 agreement and the Court's order?

A Right.

Q I want to come back and talk a little bit more about the '82 agreement, but let's go back to 1976.

You've testified that starting in 1975 you paid the Montana tax directly to Montana. Are you aware that the [p. 197] Tribe passed a tax ordinance in 1976?

A Yes.

Q And did Westmoreland have any input or involvement in that process whereby the Tribe adopted that '76 tribal ordinance?

A No.

Q Would you refer, please, to Exhibit D-527.

A D – mine says 527. I guess that's D-527?

Q Yes. And would you identify that, please?

A This is an ordinance which the Tribe adopted a tribal coal taxation code.

Q And what was your understanding regarding the amount of that tax under the tribal ordinance?

A This exhibit doesn't have a rate, but it was my understanding that the rate was 25 percent of the F.O.B. mine price.

Q And what was your understanding regarding the intended scope of that tax ordinance?

A It was my understanding, and it was our concern, that this code would apply to the ceded strip and the reservation property.

Q And what was Westmoreland's response after the Tribe adopted their '76 tax ordinance, what was Westmoreland's response to that tax ordinance?

A We filed a lengthy statement and legal memorandum [p. 198] with the Department of Interior, opposing a taxation of coal on the ceded strip.

Q Would you please refer to Exhibits 536, 537, and 538, and identify those documents?

A 536 is a statement of Westmoreland Resources, which we filed with the Department of Interior.

Exhibit 537 is a memorandum of law and support of a statement of Westmoreland Resources.

Exhibit 538 is a supplement to our statement, and memorandum of Westmoreland Resources.

Q Let me briefly ask you your understanding of Westmoreland's position with regard to the tax ordinance and the ceded strip.

First of all, with regard to the ceded strip, when Westmoreland acquired their prospecting permits, or bid on this property, what was your understanding of how the ceded strip was described in that advertisement?

A In the advertisement those prospecting permits in the ceded strip were advertised as being outside the boundaries of the reservation.

Q And in 1976, what was your understanding of who exercised primary civil jurisdiction on the ceded area?

A It was Westmoreland Resources' understanding that the State exercised jurisdiction in the ceded strip.

They maintained the roads. If any police or fire [p. 199] protection, came from the State, or local governments.

Q And what was your understanding, in 1976, regarding the extent of tribal jurisdiction on the ceded strip that was permissible under the Tribe's constitution?

MR. PELCYGER: I object to that as being irrelevant to any matter currently at issue in this case.

We dealt with the jurisdictional issues before, and to the extent this goes to the validity of the State tax, that's already been decided. I don't think it has any relevance to the current proceeding.

THE COURT: Overruled. Go ahead.

THE WITNESS: Would you repeat the question, please?

Q (By Mr. Ross:) What was your understanding, or Westmoreland's understanding, in 1976, regarding the extent of tribal jurisdiction that was allowed under their Constitution on the ceded area?

A Well, I think our position – our position was the Tribe's Constitution didn't allow taxation on the ceded strip, and, therefore, we felt that the Tribe did not have the right to tax our operations in the ceded strip.

Q Did you, therefore, believe that the Tribe would have to amend its constitution before it could exercise taxing authority on the ceded area?

A At the very least they would have to amend the [p. 200] constitution, and get the tax ordinance approved by the Department of Interior.

Q Between 1976 and 1982 did you try to stay informed regarding those two conditions, that is, whether the Tribe's constitution had been amended, and whether the Secretary had approved the Tribe's tax ordinance on the ceded area?

A As best we could, we tried to, yes.

Q And would you please refer to Defendants' Exhibit 535 and identify Exhibit 535?

A Exhibit 535 is a letter from the Department of Interior to Patrick Stands Over Bull, concerning the Tribe's tax ordinance, which had been submitted to the Department of Interior for approval.

This was a preliminary position of the department, and it says that the taxation code presents, once, again, the issue of jurisdiction over non-Indians.

I believe it says, there is no question but what the Tribe has a right to tax on the reservation, but there is some question as to whether the Tribe has the right to tax on the ceded strip.

Q And that was consistent with your position, that there was some question whether they could tax on the ceded strip?

A Yes.

[p. 201] Q Would you please refer to Defendants' Exhibit 539 and identify that document?

A This is a legal memorandum from the solicitor from the Department of Interior to the Secretary of Interior, it is dated October 13, 1976, and it concerns tribal jurisdiction over non-Indians in civil matters, primarily concerning Crow and Shoshone, banning tribal ordinances.

Q Were you aware of that memorandum?

A Yes.

Q Would you please refer to Exhibit 542 and identify and describe that exhibit?

A 542?

Q Yes.

A This is a memo from me to the partners, and I guess maybe I need to explain partners.

At that time we were a partnership, and each partner had a representative on Westmoreland Resources' operating committee, so memorandums were normally just addressed to the partners.

This memorandum encloses a memo, or memorandum from Jim Cannon, area director of the BIA, and Mr. Cannon is recommending that the Secretary not approve the tribal resolution, which was passed, I believe, at the January – tribal resolution passed in January of 1978, amending the [p. 202] constitution to provide for taxation on the reservation.

Mr. Cannon is recommending that the resolution not be approved because the Tribe did not meet the 30-day notice requirement for Constitutional amendments, and he's asking, or urging, that the Secretary make an immediate decision, so that this resolution could be put on the April council meeting.

Q So you were aware in 1978 that there were still questions, or the constitution had still not been properly amended?

A Yes.

Q Would you please refer to Defendants' Exhibit 543 and identify that exhibit?

A This is a letter from the area Director of the Bureau of Indian Affairs to Westmoreland Resources.

I don't see a date on it, but there is a received stamp of March, maybe 29th, 1978, and this letter is responding to a letter that I wrote on February 22nd, 1978, inquiring as to what action interior had taken on the resolution.

And this letter advises that the amendment to their constitution to provide for taxation over the ceded strip was denied by the Secretary of Indian Affairs on March 3rd, 1978.

Q And would you please refer to Exhibit 544 and [p. 203] identify that exhibit?

A This is a memo from me to the partners, dated April 11, 1978, and it advises that at the April 8, 1978, tribal council meeting, the meeting adjourned before they got to the resolution on amending the constitution.

Q Would you please refer to Exhibit 546 and identify that exhibit?

A This is a letter dated January 29th from me to –

THE COURT: That would be –

THE WITNESS: '82, excuse me. To R.M. Gregory, with Wisconsin Power & Light. I wrote the letter.

And the letter brings Wisconsin Power & Light up to date on the taxation issues in the ceded strip, and I point out it's important to recognize at this time that the Crow Tribe's severance tax is not effective on the ceded strip.

And then I go on to say in a later paragraph, since the tax ordinance is not effective for the ceded strip, we do not see any possibility of a retroactive application of the tax. And goes on to say that we are trying to schedule

a meeting between the Tribe, the Attorney General for Montana, and Westmoreland Resources to discuss a sharing of the tax.

Q (By Mr. Ross:) So, Mr. Presley, as late as January 29, 1982, was it your understanding that the Tribe's [p. 204] constitution had never been properly amended to extend taxing jurisdiction to the ceded area?

A January of '82, you said?

Q Yes.

A That was my understanding.

Q And was it also your understanding as of January, 1982, that the Tribe's tax ordinance had never been approved by the Secretary of the Interior as to apply to the ceded area?

A As of January '82?

Q Correct.

A Yes.

Q And under those circumstances, would Westmoreland have paid the Tribe a tax during that 1975 to January 1982 time period, in the absence of Secretary approval?

A No, it would have – there would have to be a valid, existing tax ordinance for us to be able to pass it through to our utility customers.

Q And is your testimony the same even if the Montana tax did not exist?

A Yes.

Q Did the Tribe ever attempt to enforce or collect any taxes from Westmoreland under its 1976 tax ordinance between the 1975 and 1982 time period?

A No.

[p. 205] Q A few moments ago you started to tell us what happened in 1982. I believe you indicated that the Tribe and Westmoreland entered into an agreement in 1982; is that correct?

A Yes, an amendment to the coal lease.

Q Would you please refer to Defendants' Exhibit 550 and describe that exhibit.

THE COURT: What number?

MR. ROSS: 550.

THE COURT: 550?

MR. ROSS: 550.

THE WITNESS: 550 is an amendment to the amended coal mining lease for Tract 3. I signed it on June 18, 1982. The document has a date of July 10th.

This agreement was our mechanism for protecting us from double taxation. That was our understanding, and I think that's what the language of the document says.

Q (By Mr. Ross:) Was it your understanding when you signed that June, 1982, agreement, that the Tribe did not have at that time a valid tax ordinance as to the ceded area?

A It was our understanding that they did not.

However, our attorney was very insistent, as soon as possible after this document was signed, the Tribe would proceed to amend their constitution so that we would have a [p. 206] valid, existing tax, which then would allow us to pass the tax on to our utility customers.

This amendment provides that we will pay the Tribe a tax, a severance and gross proceeds tax equal to the then state tax, less any tax that we had to pay to the State. So we felt that this agreement protected us from double taxation.

Q And was it your understanding that that agreement to pay a tax would apply from the date of that agreement forward?

A We felt that this ordinance gave us a release from any obligation we had in the past, and limited the obligation we would have to the Tribe only to the extent in the future to the severance and gross proceeds tax.

The agreement also provided that the Tribe would not levy any other taxes on us or any other assessments other than the severance and gross proceeds tax.

Q Was it your understanding that under that 1982 agreement, the Tribe released Westmoreland from any tax liability for the 1975 to 1982 time period?

A Yes.

Q I want to ask you now a few questions about Westmoreland's coal market. Would you please describe for us the geographic area of Westmoreland's coal market and the nature of its customers?

[p. 207] A Well, because of the location of our mine, the rail spur leaving our mine goes to Hysham, so our coal has to go east from Hysham to the Upper Midwest, that would be North Dakota, South Dakota, Minnesota, Lake Superior, into the Upper Midwest coal markets.

If we went west from Hysham down to Billings, and then doubled back down to Sheridan and down into the Wyoming coal fields, we would have a 260 to 300 mile rail freight disadvantage, and so basically we have the rail freight advantage over Wyoming going to the Upper Midwest. So that was our niche that enabled us to compete in the markets, Upper Midwest.

Q Can you identify any particular contracts which Westmoreland lost, due specifically to the existence of the Montana severance or gross proceeds tax?

A Not specifically to just the tax. There were a number of factors.

Q And can you identify the exercise of any particular take or pay exercise, due specifically to the existence of the Montana severance or gross proceeds tax?

A Well, beginning in the early '80's, maybe possibly late '80's, some of our original customers opted to pay what we call a take or pay under our contracts, rather than take the coal.

A take or pay payment is the sales price, less [p. 208] any expenses you don't incur as a result of not shipping the coal. So for whatever reason, whether they didn't need the coal, or whether they could buy it cheaper on take or pay, some of our customers opted to go the take

or pay route. I'm sure the severance tax had some effect on that, but I'm sure that wasn't the only thing.

I guess to answer your question, I can't specifically identify any take or pay customer which was exclusively the result of the severance tax.

Q In fact, there are quite a few factors, are there not, which affect utilities decision whether to purchase or take coal?

A Yes.

Q For example, demand would be one factor?

A Demand, demand for their power, certainly. Other alternatives, oil, gas.

Q How about reliability of the coal source?

A Yes, that could enter into . . .

Q Transportation?

A Right.

* * *

[p. 213] CROSS-EXAMINATION

Q (By Mr. Pelcyger:) Good morning. Mr. Presley, did you prior to your testimony here this morning have an opportunity to review your previous testimony in the 1984 trial?

A 1984 trial?

Q Yes.

A No.

Q Okay. What would have happened, in your opinion, if the Crow Tribe had sought to collect its 25 percent coal tax while Westmoreland was paying the state taxes to the [p. 214] State and the county?

A Well, we would have been put on the horns of a dilemma, I believe. Two different jurisdictions looking for taxes, it's hard for me to speculate on what we would do, but I'm sure that we would probably go to court, if you want me to speculate.

Q No, I didn't ask you what you –

A Go to court and ask some court to tell us what to do until the issue was resolved.

Q I was not asking you to speculate. I mean, financially, what would have been the impact economically on Westmoreland and on your coal operations?

MR. ROSS: I'm going to object. It assumes facts that are not in the record. It calls for speculation.

THE COURT: Overruled. You are asking him if he would have to pay coal severance and gross proceeds twice?

MR. PELCYGER: Right.

THE COURT: It – how it would affect the competitive market?

MR. PELCYGER: How it would affect the competitive market and how it would have affected Westmoreland.

THE WITNESS: Well, I suppose our first effort would be to try to get the utility customers to pay the extra tax.

[p. 215] Q (By Mr. Pelcyger:) No, no, I haven't asked you that.

A You want to know the economic effects?

Q What it would have done, in your opinion, to the mine and to your – and to Westmoreland's financial and economic position?

A Well, I think that's what I'm trying to say.

Q Okay, I'm sorry.

A Our first effort would probably be to – try to get our utility customers to pay two taxes. And if we were unsuccessful there, it's my opinion the mine would have shut down, period, because our profits from that mine were not sufficient enough to pay two taxes.

Q And based on your familiarity with your utility customers, what would have been their reaction to having to pay two taxes?

A It would have been negative.

Q Would they have done everything in their power to prevent that from happening?

A They would, like us, would do everything we could to keep from paying double taxes.

Q Now, I want to read to you from your previous testimony in Volume II of the trial, page 259, you were – I asked you at that time what, in your opinion, would have

been the effects of double taxation, and your answer was, [p. 216] catastrophic. It is my opinion we would not have shipped any coal as long as we were subject to two taxes. Does that remain your opinion today?

A Like I mentioned, we had two options, and probably the second one would be the more likely one, and that would be catastrophic, yes.

Q Catastrophic to Westmoreland?

A Devastating.

Q Catastrophic to the Crow Tribe?

A I don't know.

Q Well, do you believe the Crow Tribe has benefited from Westmoreland's operation?

A Yes.

Q Substantially?

A Yes.

Q And those benefits wouldn't be received if the mine shut down, would they?

A No.

Q Now, did you make those views about the impacts of double taxation to the Crow tribe?

A I don't know that we did. I don't know that the Crow Tribe ever sent us a copy of their tax ordinance, and I'm not sure that we even communicated with the Crow Tribe, but we certainly did with the Department of Interior after the ordinance was passed.

[p. 217] Q You made it known to the Bureau of Indian Affairs that you felt that the effects of double taxation would be catastrophic, as you state?

A It would not be in the best interest of the Tribe or Westmoreland Resources. That was one of the positions we took in our statement, as I recall.

Q Now, I want to read to you from your deposition of July 21, 1993.

Question: Do you recall whether at any time prior to the July 1982 lease amendment the Crow Tribe, or any representative of the Crow Tribe, had asserted that Westmoreland was required to pay taxes under the Crow Tribe's 1976 tax ordinance even though the Interior Department had concluded that the ordinance could not be applied to the ceded strip?

Answer: I believe there was a meeting between Westmoreland and Tribal members in '76 where they demanded we pay a tax, as I recall. We rejected it, said it wasn't in the best interest of the Tribe. And nothing further happens.

So do you recall that testimony? That was on page 43 of your deposition?

A Yes, I remember it, and I think – I know it was before the Secretary disapproved the ordinance on the ceded strip.

[p. 218] Q My question was not time related. It was just whether you had advised the Tribe that in your opinion the double taxation would not be in the Tribe's best interest because the mine would have to shut down in all probability?

A Well, I think at that same time this meeting occurred, we also told the Tribe that we had given them all the economic benefits we could afford to when we amended the leases in 1974, and that we had nothing further to give.

Q I understand that was Westmoreland's position. I just wanted to clarify that your belief, which you communicated to the Tribe, that it would not be in the Tribe's interest for Westmoreland to be required to pay a double tax.

A That's correct.

Q And during this entire period, Westmoreland was doing everything it possibly could to avoid having to pay a double tax, isn't that right?

A Yes.

Q And Westmoreland also took the position that Montana's tax was invalid as applied to Crow Coal, too; isn't that right?

A Yes, there was a suit that the utilities filed and the producers joined, challenging the State's tax, yes.

Q And also in this case, Westmoreland took the position Montana's tax was invalid as applied to Crow Coal;

[p. 219] isn't that right?

A I – I don't know that we took that specific position. I do know that we intervened, cross claimed, counterclaimed, and probably tried to posture ourselves on every side of the issue to protect Westmoreland Resources and its customers.

Q Well, isn't it accurate to describe Westmoreland's position throughout this period that you were willing to pay one tax or the other, but not both?

A I guess our position was that we would pay one valid tax, but not two.

Q And it really didn't matter to you to whom that tax was paid?

A Yes, that's correct.

Q Now, isn't it also true that early on in 19 – as early as 1976, Westmoreland indicated that it would be willing to pass on to the Tribe any amounts of money by which the State taxes could be reduced by whatever governmental authority, or other rights or powers the Tribe was found to have?

A I believe in '76 we said, if some way the Tribe's tax could be reduced –

Q The Tribe's tax?

A Excuse me, the State tax could be reduced, and the Tribe had had a valid tax in place, that we would [p. 220] certainly consider sharing. I believe there's a '76 letter to that effect, probably February or March.

Q Yes. May I approach the witness, Your Honor?

THE COURT: H-m h-m-m.

Q (By Mr. Pelcyger:) I have just given the witness a copy of Exhibit 346. Is that the letter to which you have referenced?

A Yes, this is a letter to Patrick Stands Over Bull, dated March 30, 1976, from Charles Brinely, President of Westmoreland Resources.

THE COURT: Is that an exhibit other than attached to the statement there? What's the number on it?

MR. PELCYGER: 346.

Q (By Mr. Pelcyger:) Is that right?

A 346.

THE COURT: 346?

Q (By Mr. Pelcyger:) Yes, I think – what were you saying about that exhibit?

A This exhibit, I described it – it's a letter to Pat Stands Over Bull, dated March 30, 1976, and it is written by Charles Brinely, President of Westmoreland Resources, and this letter responds to a meeting we had, an earlier meeting we had with the Tribe, where the Tribe asked us to respond in writing.

And in that meeting, the Tribe, in '76, demanded [p. 221] that we submit – submitted a letter to us demanding that we pay the Tribe's tax. This letter is responding to that demand. The letter says that the – in the amended lease that we negotiated, we gave the Tribe all the financial benefits that we could afford in those '74 amended leases, and the last paragraph on the first page, it says, Westmoreland Resources stands ready to work with you – I will read the whole paragraph.

We suggest, however, that the Crow Tribe consider reinstituting efforts with the Montana legislature to again

an appropriate share of the current Montana tax. Westmoreland Resources stands ready to work with you in this regard, provided that there would be no increase in the overall tax, and provided that the full cost of any proposed arrangement could be passed along to Westmoreland's customers and be able to pass that cost along – I'm editorializing – we would have to have a valid tax from the Crow Tribe.

Q Yes, but what I was referring to in my question, Mr. Presley, was the second paragraph of the letter, which refers to the negotiations that took place which resulted in the amended lease in 1974, in which Mr. Brinely states, that during the course of those negotiations the Westmoreland representatives did express a willingness to pass on to the Tribe any amounts – to pass on to the Tribe – not to share [p. 222] with the Tribe – but to pass on to the Tribe any amounts by which the burden of the expected state tax could be reduced by the exercise of whatever governmental powers the Tribe may have over the ceded strip.

Now, is that your understanding of Westmoreland's position?

A That's correct, and I assume the governmental powers would be a valid tax.

Q Well, isn't that in fact the same position that Westmoreland took during those negotiations in 1974 as reflected in this letter of March 30, 1976? Isn't that in fact the position that was incorporated into the 1982 tax amendment?

A Yes. Yes, we indicated a willingness to work with the Tribe, and if the state tax were reduced by the legislature, or some other manner, we agreed if they had a valid tax, if we could pass on to our customers, we could do that.

Q And you agreed that you would be willing to pay the Tribe the full amount of the state tax as long as you didn't have to pay the State that tax; is that right?

A I don't think this letter says that.

Q Well, that's what you agreed to in 1982, didn't you?

A Yes. [p. 223]

Q And, in fact, you have passed on to your customers the taxes due under that 1982 tax ordinance, haven't you?

A Yes.

Q And isn't it also true, as I think you stated earlier this morning, that as long as Westmoreland was required to pay the state taxes, that Westmoreland felt that it had nothing more economically that it could give the Crow Tribe?

A That's true.

* * *

[p. 235] REDIRECT EXAMINATION

Q (By Mr. Ross:) During Mr. Pelcyger's cross-examination, I think he asked you if Westmoreland would be willing to pay one tax, but not both.

But even if there had been no Montana tax, would Westmoreland have paid the Tribe that tax if the Tribe didn't have what Westmoreland thought was a properly approved tax by the Secretary of the Interior?

A No, we wouldn't, because we couldn't pass it on [p. 236] to our customers.

Q Referring to Exhibit 346, that indicates, does it not, that Westmoreland – do you have Exhibit 346?

A I don't have – well, let's see, maybe I do. Maybe I've gotten them mixed up here.

Q Is it your understanding that that letter – essentially Westmoreland offered to work with the Tribe in approaching the Montana legislature to see if there could be a reduction in the state tax? Is that generally your understanding?

A That's correct.

Q Did the Tribe take Westmoreland up on that offer to approach the Montana legislature to try to reduce the Montana tax, or to share it with the Tribe, after this letter came out in 1976? Did they ever take you up on that offer and say, yes, let's go, and actually go with you to the legislature?

A I don't know whether it was immediately after this letter, but I think at some time or other the Tribe's attorneys, George Miller, our attorney, met with Mike Greely, the Attorney General, that's my recollection at some time, but I can't tell you when, to discuss a resolution of the tax issue.

Q But you don't know whether the Tribe ever took them up on their offer and actually went to the Montana [p. 237] legislature?

A I don't have any knowledge that the Tribe ever went to the legislature and lobbied for a sharing of the tax.

Q Did the Tribe ever approach Westmoreland in 1988 and offer to reduce their tax to Westmoreland?

A No.

* * *

CROW TRIBE CONTRIBUTIONS TO THE MONTANA ECONOMY

	Total Crow Indian Income on the Crow Reservation	Crow Expenditures of Funds Held in Trust by the Bureau of Indian Affairs	Expenditures by Indian Health Services at Crow Agency	Expenditures by Bureau of Indian Affairs at Crow Agency	Other Federal Government Expenditures on the Crow	Total Expenditures Attributed to the Crow	Employment Multiplier	Employment Generated From Expenditures Attributed to the Crow Tribe
	(1)	(2)	(3)	(4)	(5)	(1)+(2)+(3) +(4)+(5) (6)	(7)	[(6)÷1,000,000)] x 20.4 (8)
1975	$5,924,063	$2,000,282	N/A	N/A	$2,109,338	$10,033,683	20.4	205
1976	6,425,065	958,165	N/A	4,326,850	1,929,338	13,639,419	20.4	278
1977	7,012,899	N/A	N/A	4,877,946	1,996,538	13,887,383	20.4	283
1978	7,728,173	N/A	N/A	5,686,840	2,010,202	15,425,215	20.4	315
1979	8,809,002	2,650,714	N/A	5,610,838	5,878,407	22,948,961	20.4	468
1980	10,229,298	8,341,493	N/A	6,064,564	4,664,167	29,299,523	20.4	598
1981	11,471,128	2,576,781	$4,166,247	6,002,456	4,174,472	28,391,085	20.4	579
1982	12,375,941	4,010,021	4,581,442	8,145,674	3,199,859	32,312,938	20.4	659
1983	12,977,996	6,850,460	5,887,828	7,681,477	3,881,773	37,279,534	20.4	761
1984	13,751,604	3,175,387	5,976,062	8,046,608	6,207,903	37,157,564	20.4	758
1985	14,462,224	3,024,823	6,317,665	7,610,485	2,597,021	34,012,219	20.4	694
1986	14,952,305	2,243,453	6,078,627	9,434,420	4,864,126	37,572,931	20.4	766
1987	15,731,237	1,256,143	6,748,031	7,747,260	2,733,109	34,215,781	20.4	698
1988	16,624,967	1,399,676	7,065,059	12,020,813	2,344,922	39,455,437	20.4	805
1989	17,680,581	4,526,438	9,290,901	9,209,862	2,279,544	42,987,327	20.4	877
1990	18,904,238	8,269,120	9,750,611	9,316,847	2,233,730	48,474,547	20.4	989
1991	19,979,377	11,402,527	11,173,648	9,312,624	2,293,385	54,161,560	20.4	1.105
1992	20,868,857	12,146,107	10,213,757	8,678,602	2,333,613	54,240,936	20.4	1.107
1993	21,794,404	11,385,837	11,361,286	8,862,400	2,337,665	55,741,592	20.4	1.137
Total	$257,703,359	$86,217,429	$98,611,164	$138,636,566	$60,069,117	$641,237,635		
New Hospital Construction 1						$13,835,671	20.4	282
Equipment for Hospital 1						$3,300,000	20.4	67

Sources and Notes

N/A indicates data not available.

Column (1): Based on the 1989 per capita income for American Indian, Eskimo or Aleut living on the Crow reservation as reported in the 1990 Census of Population and Housing, Tape File 3A.

Column (2): Taken from Bureau of Indian Affairs, Summary of Trust Fund Reports, 1975-1993.

Column (3): Obtained from Indian Health Services, Crow Service Unit.

Column (4): Taken from Bureau of Indian Affairs budget reports for Crow Agency.

Column (5): Grants and contracts from Federal agencies including the following: Department of Housing and Urban Development, Department of Energy, Department of Labor, Department of Health and Human Services, Office of Surface Mining, Department of the Treasury, Environmental Protection Agency, Department of Commerce, Economic Development Agency, Bureau of Reclamation. These figures were obtained from the Crow Tribal Council and Crow budget resolutions.

Column (7): The multiplier is taken from U.S. Department of Commerce, Bureau of Economic analysis, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)*, Second edition, Washington, DC: U.S. Government Printing Office, May 1992. Note that the multiplier applied is for households. This is very conservative and was applied to offset possible double-counting among the expenditure sources.

[1] These expenditure figures were obtained in October 1993 and, therefore, may be understated.

Table R-16

STUDIES REPORT THAT INDIAN RESERVATIONS HAVE SUBSTANTIAL ECONOMIC BENEFITS

Study	Comments
"The Economic and Fiscal Importance of Indian Tribes in Arizona," prepared by The Center for Applied Research, for The Arizona Commission of Indian Affairs, January 1993	State-wide income attributable to Arizona's Indian population is estimated to be $829.0 million annually, and the state expends only $21.9 million on behalf of the Indian population per year. State-wide tax revenue attributable to Indian consumer expenditures and enterprises is $93.0 million annually. Total off-reservation consumption by Arizona's Indian population is approximately $208.0 million annually.
"Flow of Funds on the Yankton Sioux Indian Reservation," prepared by Dr. Calvin A. Kent and Dr. Jerry W. Johnson, for the Ninth District Federal Reserve Bank, June 1976	From information received through an expenditure survey of tribal members, it was estimated that Yankton Sioux people spent over $2.2 million. The survey yielded a multiplier of 3.88, implying that an additional $8.6 million in expenditures was induced by the original $2.2 million spending by the Sioux.

The federal government spent over $3 million directly on the Sioux and an additional $1 million indirectly through state programs where federal dollars were passed through state agencies to Sioux beneficiaries.

The state of South Dakota spent only $335,477 of its own money on programs directly benefitting Indian people living on or near the reservation.

Approximately 97% of total expenditures by the Yankton Sioux people remained within the state of South Dakota.

"A regional Economic Analysis of the Turtle Mountain Indian Reservation: Determining Potential for Commercial Development," prepared by James M. Murray, University of Wisconsin-Green Bay, and James J. Harris, University of North Dakota, for the Federal Reserve Bank of Minneapolis, 1978

40% of Rolette County's (North Dakota) employment can be directly and indirectly attributed to the Turtle Mountain Chippewa Tribe.

"The reservation and its economic activities are very important to the economic base of all of Rolette County."

"The economy of the reservation is closely integrated with that of the surrounding trade centers and should not be treated as a separate entity."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff,	)	No. CV-78-110-BLG-JDS
and	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	Volume V
vs.	)	
STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

Trial in the above-entitled matter resumed for trial in open court before the HONORABLE JACK D. SHANSTROM, United States District Judge, on May 3, 1994.

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* * *

[p. 838] Q [By Robert S. Pelcyger] I would then like to turn your attention to Table R-15. Before getting to anything specific, I would you [sic] like to ask you what led you to obtain the information that is set forth in that table?

MR. SMITH: Your Honor, let me object to any questions concerning Tables R-15 and R-16. And this objection relates to the issues I raised at the conclusion of our case in chief.

[p. 839] Putting aside the accuracy or validity of the rationale behind the tables and figures to which the witness has testified to so far, these fall outside the scope, the appropriate scope, of rebuttal. None of the testimony adduced during the State's case in chief by its witnesses related to this subject matter. Indeed, counsel for the Tribe questioned both Mr. Kerins and Mr. Davis about

whether they considered these kinds of issues in their study, and they said no.

We would suggest to the court that this is the kind of evidence, that were it to have been presented, should have been presented during the Tribe and the United States' case in chief, but was not. As I said before, I prepared a short brief on this issue. I am prepared to tender it to the court and to opposing counsel at this point.

THE COURT: You can give me the brief. I guess my ruling will be that I will take it under advisement and go ahead.

MR. PELCYGER: May I briefly explain why I think it is proper rebuttal testimony?

THE COURT: Yes.

MR. PELCYGER: Your Honor, I agree with Mr. Smith's characterization, that is, that his witnesses did not undertake this specific kind of analysis, but the whole [p. 840] point of their testimony, to which I would add we objected, and which we had previously objected though our motion in limine, was to seek to offset any award to the Crow Tribe by the amount of –

THE COURT: And I allowed in Scenario 1, 2, and 3, on the reservation, on the reservation, Big Horn County, and then the state-wide.

MR. PELCYGER: Right. And this Table R-15 goes to the overall equities of the situation in terms of what did the Crow Tribe contribute to the State and to Big Horn County and is directly responsive to their testimony.

Again, the reason it wasn't part of our case in chief is we sought, as you recall, to – we claimed that the whole issue was irrelevant, that the expenditures, any expenditures to be properly offset, should be related to the Absaloka mine, but the court allowed the testimony, and this is responsive to that.

THE COURT: I will – again, I will take the motion under advisement, but go ahead.

Q (By Mr. Pelcyger:) I think the question pending, Dr. Berkman, was before addressing this specific information in Table R-15, ask you to describe what led you to seek that kind of information and the purpose of the information that's provided.

A [By Mark P. Berkman] Yes. Well, it struck me during – in reading the [p. 841] Galusha reports initially, and listening to testimony, that there are other ways of looking at the costs and benefits of the Crow Reservation being located within the State of Montana.

And that if you were really addressing questions of whether or not the Tribe and the reservation were a net burden or gain to the State, you would have to look beyond the simple accounting structure, either the one that was initially done by the Galusha firm, or even the corrections that we've made that we reviewed here today. It's a much broader and more complex question to determine whether or not the reservation is an asset or a problem for the – a burden, rather, to the State.

So I undertook some preliminary work to investigate what we can say about that question.

Q And with that background, what did – what information did you seek, and how was that portrayed on Table R-15?

A Well, R-15 is my presentation of a fairly standard form of impact analysis. It's commonly done, for example, when government analysts, or policy analysts, or anyone else for city or regional planners are trying to estimate the impact of, say, a new power plant or a new military installation, or the closing of a military installation, or any other major economic activity.

[p. 842] We want to see what it does to the local economy. And by what it does, I mean we want to see what it does in terms of generating income and earnings and employment and output to the local or state economy.

And so, in order to do that here, we treated the reservation like we would treat any other government installation, say a military base. And the first step in doing that kind of analysis is identifying the amount of money that's being invested, or spent, by and for the reservation.

So we undertook to identify the level of those funds being spent by contacting the BIA, by talking to Crow budget officials, by going to other federal agencies that provide services directly to the reservation, including the IHS, and Department of Interior, Office of Surface Mining, and several others, and there we were able to identify the amount of money that was in fact being spent each year, '75 through '93, on the reservation.

I want to be somewhat cautious here, it's difficult to come up with these numbers. They are not consistently reported. There is no single source document to go to. So that you will see in fact that there are NA's in a number of places where we just couldn't identify any numbers at all. But even in those years where we do have numbers, it is quite possible that we've missed some.

[p. 843] And I should also add that it is also possible there could be some double-counting in here. It is very hard to make that distinction, and we tried to be careful about that, but it is quite possible that there remain some double-counting. But while there is possibility for double-counting, there are also omissions. So it is hard to say under further research the number would go up or down.

In any event, once we have identified that flow of funds, we then sum those up, and those are what you see in Column 6 of this table. So that over the period '75 to '93, we determined that over $640 million dollars had been spent on providing programs and services and jobs to members of the Crow Tribe, which is certainly a sizable amount of money.

In addition to that, we noted that there is a new hospital under construction being scheduled for completion within the next year, and that generated an additional amount of money, a new investment and construction of almost $14 million and then additional $3.3 million for equipment purchases for that hospital.

So we then decided that at least to give some sense of magnitude to these kinds of numbers, we would also look at one of the standard impacts that's measured when looking at the contribution of, say, a federal installation,

or a powerplant, and that is how many jobs are generated by [p. 844] this additional spending. And to do that, we often rely on what's called an employment multiplier. That's what is shown in Column 7.

An employment multiplier represents for every additional million dollars spent, how many additional jobs are generated in the economy. That is, that money is then paid to local workers, they, in turn, buy goods and services with that money, which yet generate another round of jobs. And in this particular kind of multiplier, which is developed from an input-output model developed by the Department of Commerce called the Rims multiplier, it includes what they refer to as both direct, indirect, and induced impact. So we are getting a first and second round effect of jobs, as well as a third round induced by the spending of the first two.

I have chosen in Column 7 a very conservative multiplier. It's the multiplier that represents household spending. Ordinarily, the more precise way to make these estimates is to assign a multiplier that's quite specific to the kind of spending going on. So, for example, if we are spending money on construction, there would be a multiplier for construction workers. If we are spending money on health care services, there would be a multiplier for health care.

But because of some of the uncertainties in some [p. 845] of these numbers, and because in fact there is a chance for some double-counting, I thought I would be conservative as a first cut to use the low end of the multipliers I could find. I should also add that this multiplier is specific to Montana. The Rims system, or model I

mentioned a minute ago, is developed and produced at the state level, and for most counties can also be obtained. So it is specific to that extent.

It does have, probably because it is part of an input-output model, have some infirmities associated with it. One of which is that it oftentimes doesn't accurately account for the fact that some of the spending that will take place, in fact large parts of it for certain categories, will clearly flow not only outside the reservation, but outside the state. For example, hospital equipment is – much of it may not be manufactured in the State of Montana. Although, it may be then bought from local distributors in the state, so they would share in the overall spending on that piece of equipment.

But what is also I think important to recognize in this particular instance, we are looking at spending on the Crow Reservation. There are very few opportunities to spend money on the Crow Reservation. There is more now than there used to be. I visited the new casino, but even taking that into account, and assuming your luck isn't particularly [p. 846] good, there is still not a great deal of spending on the reservation. People on the reservation travel outside the boundaries of the reservation to spend their money, and many of the service providers on the reservation live off the reservation. So that it's quite likely a good portion of this does benefit the surrounding communities, both in Big Horn County and elsewhere in the state, and that should be recognized.

Finally, after all that, Column 8 is then simply taking that employment multiplier, times the expenditure level, and so you can see that based on the spending level, for

example, in 1975, of just over 10 million dollars, that using that multiplier we estimate that 205 jobs were generated. And you can see that number moves around over time, depending on how much we identify as being spent. And by 1993 as spending increased, as the Crow budget grew, partly through the results of the collecting a severance tax, we see more spending, and in fact more jobs being created. Which clearly benefit both the Crow and residents of the surrounding localities in the state.

Q Now, are those – Column 8, does that represent – where are those additional jobs located?

A Well, again, most of these jobs would be located, at least the secondary and induced jobs, would be located off the reservation. Again, there is very little economic [p. 847] activity on the reservation for people to spend their money on. So that the monies and the jobs, as a result, flow off the reservation.

Q And is this, in general, supposed to represent the jobs throughout the state then?

A Yes, again, this is a state level multiplier. So it would estimate jobs regardless of location within the state. We can't pinpoint where they would happen.

Q Would your opinion be that most of them are likely to be closer to the reservation?

A That's really actually hard to say. I mean, to the extent that the spending patterns are typically on basic commodities, yes. But to the extent that we are talking about payment for certain kinds of equipment, like hospitals, that would clearly be further away. But by and large,

spending on basic commodities is clearly going to be quite local.

Q I note a significant increase in Column 2, the Crow expenditures of funds held in trust by the Bureau of Indian Affairs. Do you know what that was attributable to?

A I recall there was one jump, I think that was the year because of emergency services money.

Q I'm talking about Column 2.

A Oh, Column 2.

Q I believe you stated you thought that was [p. 848] attributable to the increased funds resulting from this litigation?

A No, in later years, after 19, say '89, or even 1988, you see a very large increase in those things. That I attribute to the tax. The earlier number, in this column, I believe possibly, was partly a result of this Shell bonus payments made in that year for the Youngs Creek Mine.

Q But the ones since 1989, or 1990, were attributable to the increased income to the tribe resulting from the severance tax?

A Yes.

Q Now, you refer to the hospital. Do you know how much money will be spent for the hospital once it's completed?

A I think the total exceeds 20 million, about $25 million.

Q Are there any other points you would like to make with regard to Table R-15?

A I don't think so.

Q Table R-16, is that the followup to R-15?

A Yes. This table summarizes three studies that I reviewed during the course of my analysis, which address the same kind of question I was attempting to take a first cut cut at. That is, looking at what the economic impacts are of a reservation within a state economy.

[p. 849] The first one listed was done in 1993, looking at the contribution, or the impacts of Indian tribes and reservations in Arizona, for the Arizona Commission of Indian Affairs. And that's the most recent one.

They, as indicated under the comments column, found that the Arizona Indian population generates a substantial amount of income, $829 million on an annual basis, but that the state spends only $29.9 million on behalf of the Indian population per year.

They also generate a statewide tax revenues attributable to Indian consumers and enterprises is $93 million annually, and that total off-reservation consumption by Arizona's Indian population is approximately $208 million dollars annually. Again, the same kind of phenomenon happens on most reservations where there is not a tremendous amount of economic base, or economic activity within the confines of the reservation, so most spending takes place elsewhere.

The next study – these aren't in exactly chronological order – on the list, though, is a study done in – I don't

remember if this was – this was in South Dakota, done in 1976 for the Ninth District Federal Reserve Bank. It, again, showed that the reservation generated substantial income, and that most of that income benefited the economy surrounding the reservation, not necessarily the [p. 850] reservation itself. For example, the final comment here is that 97 percent of total expenditures by the Souix [sic] people were made within the State of South Dakota. Getting back to your question before, the extent that monies are spent on basic commodities, they are more likely to be spent locally.

And finally, the other study also done for the Federal Reserve Bank of Minneapolis looked at the Turtle Mountain Reservation and its impacts on the regional economy. And it found, for example, that in the county that's contiguous with the reservation, that 40 percent of the employment in the county could be either directly or indirectly attributed to the Turtle Mountain Chippewa Tribe. That's a sizable amount. And, again, that the reservation, because of the fact that it relied heavily on surrounding county for the provision of goods and services, made a net contribution to the local economy.

So I take these as additional evidence that you really have to look at that kind of analysis in order to establish whether a particular reservation is a burden or an asset to the state. I think it properly can be viewed much like other installations, even like a military base, which, at times, people in Congress seem very eager to protect and maintain.

* * *

(10)

No. 96-1829

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

CROW TRIBE OF INDIANS; and
UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

May an Indian tribe, or the United States on the tribe's behalf, recover in quasi-contract from a State and a county taxes paid pursuant to state law by a third-party taxpayer that has waived any entitlement to a refund?

PARTIES

All parties are listed in the caption.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The final opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at 92 F.3d 826 and 98 F.3d 1194 and reproduced commencing at Pet. App. 1. Prior decisions in this matter by the court of appeals are reported at 650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982), and reproduced commencing at Pet. App. 167 and 169; at 819 F.2d 895 (1987) and reproduced commencing at Pet. App. 88; and at 969 F.2d 848 (1992) and reproduced commencing at Pet. App. 58. A prior summary affirmance of the court of appeals' 1987 decision is reported at 484 U.S. 997 (1988) and reproduced commencing at Pet. App. 87.

The opinion of the district court is unreported and reproduced commencing at Pet. App. 17. Prior reported opinions of the district court in this matter that were the subject of review by the court of appeals appear at 469 F. Supp. 154 (1979), which is reproduced commencing at Pet. App. 197; and at 657 F. Supp. 573 (1985), which is reproduced commencing at Pet. App. 110. An unreported opinion of the district court reviewed by the court of appeals in its opinion reported at 969 F.2d 848 (1992) is reproduced commencing at Pet. App. 67.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 6, 1996, and

rehearing was denied on February 21, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter presents a question of federal common law. Statutory provisions involved include the Omnibus Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396g, which is reproduced at Pet. App. 230-33, and the Montana coal severance and gross proceeds taxes as enacted by 1975 Mont. Laws chapter 525, which are reproduced at Pet. App. 234-42.

STATEMENT OF THE CASE

This case began in 1978 when respondent Crow Tribe challenged the validity of two tax statutes enacted by the Montana legislature several years earlier: the Montana coal severance tax and the Montana gross proceeds from coal tax. 1975 Mont. Laws ch. 525, §§ 1-12. The taxes were never imposed on the Tribe. They instead were imposed on and paid by Westmoreland Resources, Inc., a corporation mining coal held in trust for the Tribe pursuant to a lease under the Omnibus Mineral Leasing Act of 1938, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g). The coal mined by Westmoreland underlies an area known as the ceded strip whose surface lands are outside the Crow Reservation. After nine years of litigation, the tax statutes were held preempted by the court of appeals

because, in relevant part, they "had at least some negative impact on the coal's marketability" and because the taxes were not "narrowly tailored" to achieving legitimate state interests. *Crow Tribe v. Montana*, 819 F.2d 895, 900, 902 (9th Cir. 1987) ("*Crow II*"), *aff'd mem.*, 484 U.S. 997 (1988) (Pet. App. 100, 105).

On remand following *Crow II*, the Tribe and respondent United States, which had intervened as a plaintiff in 1983, filed amended complaints seeking recovery of approximately $58 million in taxes paid by Westmoreland and prejudgment interest on that amount which respondents estimated at the subsequent trial to exceed $300 million. Westmoreland paid these taxes without initiating any proceedings provided under Montana law for recovery of taxes alleged to have been assessed unlawfully. Westmoreland later entered into a settlement agreement with petitioners under which it waived all claims to the taxes' recovery. The issue now is the propriety of the Ninth Circuit's judgment directing that Westmoreland's taxes be refunded to respondents under a federal common law claim for money had and received notwithstanding this Court's decision in *United States v. California*, 507 U.S. 746 (1993).

I. THE CEDED STRIP

Under the May 7, 1868 Treaty of Fort Laramie, 15 Stat. 649 (1868), eight million acres of land were set aside for the Crow Indian Reservation now located in the State of Montana. Pet. App. 114 (FOF ¶ 4). The Reservation was reduced in size by several cessions of land, including the Act of April 27, 1904, 33 Stat. 352, that removed over 1.1

million acres. *Id.* The land subject to the 1904 Act became known as the ceded strip, and virtually all of its surface area eventually was homesteaded by non-Indians, with the sales proceeds paid to the United States and held in trust for the Tribe, or conveyed to Montana for school trust purposes. *Crow II*, 819 F.2d at 896 (Pet. App. 91); Pet. App. 114-16 (FOF ¶¶ 7, 13, 14). Ownership of the subsurface mineral estate underlying disposed-of lands, however, was retained by the United States. Pet. App. 116 (FOF ¶ 15); *id.* 152 (COL ¶ III(c)). The Tribe retained beneficial ownership of undisposed-of ceded lands, and under the Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121, such lands – which totaled approximately 10,000 acres – were restored to reservation status. Pet. App. 117-18 (FOF ¶ 20); *see Ash Sheep Co. v. United States*, 252 U.S. 159, 163-66 (1920) (describing nature of the interest in the ceded lands retained by the Tribe under the 1904 Act).[1]

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[1] The district court construed the 1958 Act as also restoring to tribal ownership the undisposed-of mineral estate but not returning that estate to "reservation status." Pet. App. 152-54 (COL ¶ III(e)-(g)). The court of appeals in *Crow II* disagreed, holding that the mineral estate underlying the ceded strip was a component of the Reservation. 819 F.2d at 898 (Pet. App. 94-95). It is unclear whether the court of appeals' conclusion was predicated on the 1958 Act, since it deemed controlling under law-of-the-case principles a comment in its prior decision in *Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390 (9th Cir.) (*"Crow I"*), *cert. denied*, 459 U.S. 916 (1982), that "the revenues may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself." 650 F.2d at 1117 (Pet. App. 195). The *Crow I* opinion did not discuss the 1958 Act or otherwise explain why the Tribe's mineral resources, to the extent those resources underlie the ceded strip, constitute a component of the Reservation.

No dispute exists that "[s]ince 1904 the State of Montana and its political subdivisions have had legal authority and responsibility for the provision of public services on the ceded strip." Pet. App. 123 (FOF ¶ 37); *see also Ash Sheep*, 252 U.S. at 163-66; *Crow II*, 819 F.2d at 898 (Pet. App. 94-95 & n.1). These services include "general government services, public safety, health and welfare, natural resources, public works, transportation, recreation, and culture and education." Pet. App. 123 (FOF ¶ 38). The Tribe provides little or no governmental services. Pet. App. 38 (FOF ¶ 65); *id.* 128 (FOF ¶ 58).

II. WESTMORELAND'S MINING OPERATIONS WITHIN THE CEDED STRIP

Among the minerals underlying the ceded strip are substantial coal deposits. Pet. App. 114 (COL ¶ 6). In 1972 the Tribe and Westmoreland entered into a lease pursuant to the Omnibus Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396g (Pet. App. 230-33), to produce coal on the ceded strip. Pet. App. 121 (FOF ¶ 30); Defs. Ex. 532. That lease was superseded in 1974 by an amended lease and accompanying settlement agreement. J.A. 6, 39. The district court found the amended lease's royalties, initially set at the greater of 35 cents per ton or 6 percent of the f.o.b. mine price with provision for an increase in future contracts, "were recognized at the time as being among the highest anywhere" (Pet. App. 146 (FOF ¶ 126)), and the settlement agreement stated that the Tribe deemed the amended lease and associated documents as "satisfactory in that they provide the financial, economic and social protections that the Tribe deems

necessary" (J.A. 44). Westmoreland commenced production under the lease in 1974. Pet. App. 122 (FOF ¶ 34).

Westmoreland is the only coal producer within the ceded strip. Pet. App. 19 (FOF ¶ 8). On-site regulation of its facility has been, and remains, a function performed largely by the Montana state agency responsible for mine regulatory matters. Pet. App. 130-31 (FOF ¶¶ 60-64). Since 1990 that regulatory responsibility has been exercised in accordance with a memorandum of understanding between the agency and the United States Department of the Interior, Office of Surface Mining, under which the state agency performs "lead analyses and initial work" that is reviewed by the federal agency for concurrence purposes. II Apr. 19, 1994 Tr. 242:6 - 243:2; Defs. Ex. 523.

III. WESTMORELAND'S STATE TAX PAYMENTS AND THEIR USES

The Montana coal severance and gross proceeds taxes became effective on July 1, 1975. 1975 Mont. Laws ch. 525, §§ 1-12 (codified as amended at Mont. Code Ann. §§ 15-23-701 to -707 & §§ 15-35-101 to -205 (1997)) (Pet. App. 234-41); *see* Pet. App. 23 (FOF ¶ 25). As initially enacted, the severance tax contained a tax rate schedule based on heating quality and type of mining operation, with a tax rate of 30 percent of the "contract sales price" generated by Westmoreland's coal production. 1975 Mont. Laws ch. 525, §§ 2, 3 (Pet. App. 236-37); Pet. App. 25 (FOF ¶ 31); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 612-13 (1981). The tax was paid quarterly to the State and distributed into various funds for

current expenditure and into several trust funds where only income and interest were available for expenditure. Pet. App. 23-24 (FOF ¶¶ 27-29). During the period for which respondents have sought recovery, Westmoreland paid approximately $46.8 million in severance taxes with respect to coal subject to the tribal lease, of which amount 61 percent, or $28.5 million, was expended for current use and the remainder placed into the trusts. Pet. App. 24 (FOF ¶ 29).[2] The cost of these tax payments was passed on contractually by Westmoreland to electric utilities purchasing its coal. Pet. App. 30 (FOF ¶ 44); *id.* 145 (FOF ¶ 120).

The gross proceeds tax is imposed annually by the county in which the mining activity occurs. 1975 Mont.

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[2] The trusts were the coal trust fund established under article IX, section 5 of the Montana Constitution and two statutory trusts, one for education and the other for fish, wildlife and parks-arts council ("FWP") purposes. J.A. 327-29. The apportionment between current expenditure and trust fund payments from Westmoreland's taxes was:

Year	Tax Amount	Coal Trust	Educ. Trust	FWP Trust
1976	$5,282,763.01		$528,276.30	$ 66,034.54
1977	5,834,899.75		583,489.98	72,936.25
1978	6,720,489.48	$1,680,122.37	504,036.71	63,004.59
1979	6,987,988.94	1,746,997.24	524,099.17	65,512.40
1980	5,778,393.90	2,036,003.87	748,478.01	187,119.50
1981	5,852,067.73	2,926,033.87	585,206.77	146,301.69
1982	7,714,644.08	3,857,322.04	771,464.41	192,866.10
1983	2,639,781.65	1,319,890.83	263,978.17	65,994.54
	$46,811,028.54	$13,566,370.22	$4,509,029.55	$859,769.61

Pet. App. 24 (FOF ¶ 29). The corpus of the education trust was expended in 1991. J.A. 328.

Laws ch. 525, § 10 (codified as amended at Mont. Code Ann. § 15-23-702 (1997)) (Pet. App. 241-42). During the period relevant here, the coal producer was required to report the dollar amount of the gross yield or value of its production, calculated in the same manner as the "contract sales price" for severance tax purposes, to the Montana Department of Revenue which then certified the amount to the county assessor. The tax amount then was determined by application of the county's property tax millage rate for the year in question. Pet. App. 25-26 (FOF ¶ 33); *id.* 138-39 (FOF ¶ 98). Westmoreland's mine is located within Big Horn County, and Westmoreland paid approximately $11.4 million in gross proceeds taxes with respect to coal mined under the tribal lease between 1975 and 1986. Pet. App. 26-27 (FOF ¶ 35). Of this amount, $3,060,345.17 was disbursed to the County. The balance, $8,368,769.09, was distributed to other taxing jurisdictions for which the county treasurer acted as a depository. Defs. Ex. 614 at 106. Ninty-one percent of the balance, or two-thirds of the total tax amount paid, went to school districts serving children within the County, including children residing on the Crow Reservation. *Id.* The percentage of Indian children within the County's public schools averaged 58.8 percent between 1974 and 1990. *Id.* at 10. As with the severance tax, the cost of the gross proceeds tax payments was passed on by Westmoreland to the utilities that purchased the coal.

Westmoreland paid the severance and gross proceeds taxes without invoking available state law procedures to challenge its obligation to do so. Pet. App. 37 (FOF ¶ 60); *see also* Pet. at 3 n.1 (describing tax protest procedures available to Westmoreland). Not only did Westmoreland

fail to invoke available state law refund procedures, but it also entered into a settlement agreement with Montana and Big Horn County in 1991. J.A. 294; *see* Pet. App. 37 (FOF ¶ 61). Westmoreland agreed to dismiss a cross-claim (J.A. 206-07) filed in the proceeding below against the State and the County seeking recovery of previously paid severance and gross proceeds taxes and to "abandon[], waive[] and otherwise disclaim[] any claim of entitlement for refund of [such] taxes." J.A. 295. In return, Westmoreland received a payment of $50,000 from Montana and the County. *Id.*

IV. THE 1976 TRIBAL COAL TAX CODE AND WESTMORELAND

In January 1976 the Tribe adopted a tax code that imposed a 25 percent severance tax on "all persons engaged in or carrying on the business of coal mining within the boundaries of the Crow Indian Reservation." J.A. 81. The term "boundaries of the Crow Indian Reservation" was defined to include the ceded strip. *Id.* Because the Crow tribal constitution grants the Tribe only the power to impose taxes or license fees on nonmembers "doing business within the boundaries of the Crow Indian Reservation, subject to review by the Secretary of the Interior" (Defs. Ex. 526 at 4), the tax code was submitted to the Department of the Interior for review and approval. Westmoreland opposed approval of the tribal code to the extent it applied to the ceded strip, contending in part that the tribal constitution did not permit the Tribe to tax non-reservation activities. Pet. App. 31 (FOF ¶ 48); *see* Defs. Exs. 536-38, 540. In 1977 Department of

the Interior officials approved the taxation code for application to the Reservation but specifically disapproved it for application to the ceded strip. Pet. App. 143-44 (FOF ¶ 114); *see* J.A. 217-18, 223. The Tribe did not seek judicial review of this decision but instead attempted unsuccessfully to amend its constitution to satisfy the Department's objection. Defs. Exs. 542, 543. The inapplicability of the tribal tax to Westmoreland was uncontested during the 1976 through 1982 period when all of the severance taxes and most of the gross proceeds taxes now sought were paid to petitioners. Pet. App. 144 (FOF ¶ 117).[3]

Westmoreland's concern over the validity of the tribal tax was motivated by two considerations: avoiding concurrent taxation by the Tribe and Montana and inability to pass on to its customers a tribal tax that was not approved by the Department of the Interior. Pet. App. 31 (FOF ¶ 50); *id.* 145 (FOF ¶ 120). This concern was addressed in a lease amendment between the parties entered into during July 1982, which was approved by the Department on September 29, 1982, and by obtaining an oral commitment of the Tribe's attorneys to secure

[3] The district court's finding on this issue was supported amply by the record. The Tribe's second amended complaint filed in 1978 referred to the Secretary's nonapproval, as did Westmoreland's answer to the latter. J.A. 97-98, 108. The Tribe's attorneys, moreover, prepared a legal analysis in April 1982 which noted the pendency before the Department of an amendment to the Tribe's constitution to permit ceded strip taxation and which observed that "[i]f the amendment to the constitution is not approved, the result will be to foreclose any severance tax on ceded strip coal" should the state taxes be invalidated. J.A. 134.

secretarial approval of a constitutional amendment extending tribal taxation authority to the ceded strip. Pet. App. 32-35 (FOF ¶¶ 51-54); *see also* J.A. 388-89. Under the lease amendment, Westmoreland agreed to pay the Tribe a tax equal to the aggregate amount of the Montana severance and gross proceeds taxes, less what actually was paid to the State or Big Horn County. J.A. 136; *see also* Pet. App. 32-33 (FOF ¶ 51). The amendment additionally contained a waiver provision stating that "[c]ompliance with the terms of this Agreement shall satisfy any obligation which Lessee may have now or at any time hereafter to pay any severance or other tax to Lessor pursuant to any tax ordinance which now exists or may be adopted by Lessor hereafter, and Lessor shall not attempt to assess or collect any tax or other amount from Lessee except as provided in the lease as amended." J.A. 136. The 1982 lease amendment thus was intended to establish a prospective, contractually grounded "tax" obligation on Westmoreland's part to the Tribe not amenable to unilateral modification by the Tribe. Pet. App. 32 (FOF ¶ 53).

Shortly after the Department of the Interior's approval of the lease amendment, the Tribe and Westmoreland moved under Fed. R. Civ. P. 67 for leave to deposit its severance tax payments into the district court's registry pendente lite, and the Tribe simultaneously requested issuance of a preliminary injunction against enforcement of the severance tax. CR 114, 118. The district court granted both motions in January 1983, and no further severance tax payments were received by Montana with respect to Westmoreland's ceded strip production of coal subject to the tribal lease. J.A. 211. Westmoreland continued to make gross proceeds payments to

Big Horn County until November 1987 when, following issuance of the court of appeals' decision in *Crow II*, the district court directed all further payments to be made into its registry. CR 326, 330. Westmoreland deposited $23.9 million in severance and gross proceeds tax payments pursuant to the preliminary injunctions. J.A. 332. The escrowed funds, including interest and less payments to certain tribal creditors, were distributed to the United States in trust for the Tribe after the taxes were invalidated in *Crow II*. CR 429, 430, 457, 458, 559.

V. THE PROCEEDINGS BELOW

A. *Crow I* and *Crow II*

As noted, the Tribe initiated this litigation in 1978 by challenging application of Montana's coal taxes, inter alia, to coal mined by Westmoreland in the ceded strip. The district court dismissed the complaint for failure to state a claim, but the Ninth Circuit reversed. *Crow Tribe v. Montana*, 469 F. Supp. 154 (D. Mont. 1979), *rev'd*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390 (9th Cir.) ("*Crow I*"), *cert. denied*, 459 U.S. 916 (1982). However, in so holding, the *Crow I* court observed, in words which have become rather hollow, that, "[a]s to the taxes already paid by Westmoreland, . . . it is true that the Tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid." 650 F.2d at 1113 n.13 (Pet. App. 186 n.13).

Following the remand and trial, the district court concluded that the taxes were not preempted and did not impair tribal sovereignty. *Crow Tribe v. Montana*, 657 F. Supp. 573 (D. Mont. 1985) (Pet. App. 110). In so ruling,

the district court found that there was "no convincing evidence that the state's taxes affected the Crow Tribe's ability to obtain a reasonable royalty from Westmoreland" (Pet. App. 145 (FOF ¶ 123)); that there was "no convincing evidence in the record that the gross proceeds tax has prevented or impeded the marketing of the Tribe's ceded strip coal" (*id.* at 146 (FOF ¶ 129)); and that "[t]he royalty payments which the Crow Tribe has negotiated from Westmoreland were recognized at the time as being among the highest anywhere, and the Tribe presented no evidence of any higher royalties being paid to any other Indian coal owner" (*id.* (FOF ¶ 126)).

Despite leaving these factual findings undisturbed, the Ninth Circuit again reversed the district court. The court reasoned that Montana's taxes were invalid because the State "failed to rebut evidence that the taxes had at least some negative impact on the coal's marketability" and that "[a]ny finding of interference [with federal and tribal interests] would be enough to subject the state taxes to preemption" absent the existence of "legitimate" state interests which the taxes were "narrowly tailored" to achieve. *Crow II*, 819 F.3d at 900, 902 (Pet. App. 100, 105). The court of appeals used the same rationale to conclude that the state taxes infringed impermissibly on the Tribe's sovereignty. *Id.* at 902-03 (Pet. App. 105-07). This Court approved that decision summarily. *Montana v. Crow Tribe*, 484 U.S. 997 (1988) (Pet. App. 87).

B. *Crow III*

The Tribe first advanced a claim seeking recovery of Westmoreland's severance and gross proceeds tax

payments in its third amended complaint filed after the remand from the court of appeals in *Crow I*. J.A. 142. The district court had no need to address that or other claims for retroactive relief in its decision following the first trial because it upheld the taxes' validity. Pet. App. 110. Following *Crow II*, however, the question of retroactive relief became relevant.

In October 1989 the Tribe filed its fourth amended complaint that consisted of two claims for relief: an action in assumpsit for money had and received seeking recovery of Westmoreland's tax payments previously made to petitioners, and an action for imposition of a constructive trust on all such payments. Pet. App. 258-60. Both claims alleged that the Tribe was entitled to recoup the tax payments by virtue of tribal taxation codes and agreements with Westmoreland. Pet. App. 258-59. The brief filed in support of the motion to amend stated that a purpose of the proposed complaint was "to clarify Plaintiff's theories with respect to the remaining issues." CR 476 at 1. The United States, which had intervened as a plaintiff in June 1983 (CR 149), lodged its first amended complaint in March 1990 adopting almost verbatim the Tribe's fourth amended complaint except for a request that any recovery of Westmoreland's tax payments be awarded to the United States in trust for the Tribe. Pet. App. 243.

Petitioners' motion for summary judgment with respect to the amended complaint was denied in December 1990. Pet. App. 67. In rejecting the contention that the amended complaint failed to state a claim, the district court reasoned that the Tribe's restitution allegations must be resolved under federal common law principles,

which required the Tribe to establish "1. a wrongful act; 2. specific property acquired by the wrongdoer . . . traceable to wrongful behavior; [and] 3. . . . a reason, in equity and fairness, why the person holding the property should not be allowed to keep it." Pet. App. 81. The court reasoned further that "[i]t is a question of fact where the equities lie in this case . . . [and] whether a remedy in restitution arises at all" and identified several factors it deemed particularly germane:

> The court of equity must consider and balance such equitable factors as the amount of money collected by the State, whether the Tribe would have collected similar amounts but for the State tax, the amount of money that the State channeled to services enriching the Tribe, and so on. Only upon inspecting the field of countervailing equities can the Court, in fairness and good conscience, impose upon the State of Montana a decree in equity to release coal severance tax funds.

Pet. App. 84. The court subsequently granted petitioners' motion requesting certification of the order for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 61.

The court of appeals, after initially granting leave to appeal, concluded in July 1992 that such leave had been given improvidently and dismissed the appeal. *Crow Tribe v. Montana*, 969 F.2d 848 (9th Cir. 1992) (per curiam) (*"Crow III"*) (Pet. App. 58). It nonetheless issued an opinion discussing briefly the fundamental question of whether the Tribe had a right to recover taxes it never paid. Relying on its previous finding that the taxes had "at least some negative impact" on the Tribe's ability to collect royalties – but not addressing its prior conclusion

in *Crow I* that the Tribe is "not entitled to any refund if the tax statutes are declared invalid" – the panel stated that the "duty inter sese between the interests of the Crow Tribe and the money collected from a third person by Montana's void tax" was established in *Crow II*. 969 F.2d at 848 (Pet. App. 58). The court did not explain how the reasoning in its earlier decision on the issue of pre-emption controlled its decision on the entirely distinct question of whether the Tribe could state a claim for quasi-contractual relief. It also did not explain why the fact the Tribe suffered "at least some negative [economic] impact" entitled it to recoup an amount equal to *all* of Westmoreland's tax payments.

C. *Crow IV*

On remand and after a second trial, the district court rejected respondents' quasi-contract claim. It found that, even had the state taxes not been imposed, Westmoreland would not have paid the tax imposed under the Tribe's 1976 taxation code because the code's application to the ceded strip had not been approved by the Department of the Interior and because the tax therefore could not be passed on to Westmoreland's utility customers. Pet. App. 35 (FOF ¶ 57); *id.* 51-52 (COL ¶ 30). The court found further that petitioners provided substantial services to the Reservation and its residents and reiterated its 1985 findings that Montana and its local subdivisions provide essentially all governmental services on the ceded strip. Pet. App. 37-38 (FOF ¶¶ 62-63, 65); *id.* 47-48 (COL ¶¶ 18, 20); *id.* 128-31 (FOF ¶¶ 56-70). Tribal members residing on the reservation thus have access to the same state services

as other residents living on or off the Reservation, and over an 18-year period between 1975 and 1992 the cost of state services provided to tribal members was estimated conservatively at $79 million. Defs. Ex. 511 at 55. Other evidence showed that tribal members residing within Big Horn County received county and school district services between 1975 and 1987 with an estimated cost of $25.4 million. Defs. Ex. 614 at 2.

Turning to the question whether respondents had established a viable quasi-contract claim, the district court concluded that Montana and Big Horn County had received Westmoreland's tax payments pursuant to a then-existing lawful obligation; that the obligation was independent of any which Westmoreland might owe the Tribe; that Westmoreland did not initiate available state law proceedings to recover the severance and gross proceeds taxes; and that the Tribe, presumably with respect to the 1983-87 gross proceeds tax payments made subsequent to the 1982 lease amendment, could have redressed, but did not, Westmoreland's failure to initiate state refund procedures "by proceeding against Westmoreland or . . . contract[ing] with Westmoreland to initiate such appropriate action to recover the Montana taxes." Pet. App. 50-51 (COL ¶¶ 27, 28). The district court observed that accepting respondents' theory "would allow the Tribe and the United States to recover taxes which the actual taxpayer admittedly cannot." Pet. App. 9 (COL ¶ 28).[4]

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[4] The district court additionally rejected a claim by the Tribe and the United States that "restitution damages" should be awarded with respect to alleged interference with a

The Ninth Circuit reversed the district court, holding that denial of equitable relief in the form of restitution of Westmoreland's tax payments was an abuse of discretion because "[t]he equities in favor of restoring improperly collected revenue to the entity entitled to receive them are strong" and remanding "for entry of an order directing the State and County to disgorge the improperly collected taxes" and to resolve respondents' claim for prejudgment interest which they claimed at trial to be $315 million as of January 1994. *Crow Tribe v. Montana*, 92 F.3d 826, 830 (9th Cir. 1996) (per curiam) (*"Crow IV"*) (Pet. App. 12); *see* Pls. Ex. 319 at Table 3.1. The court of appeals based the reversal on the trial court's failure "to give appropriate weight to the law of this case as established in the three prior appeals" – two of which addressed the issue of preemption and the third of which relied on the first two. *Id.* at 828 (Pet. App. 8).

Most importantly, the Ninth Circuit rejected the district court's reliance on the fact that the Tribe had not paid the taxes at issue as a basis for denying relief as "in effect reinstat[ing] the privity requirement we had already rejected in *Crow III*." *Crow IV*, 92 F.3d at 829 (Pet. App. 9). The court of appeals then held "the Tribe stated a claim for equitable relief *despite the absence of traditional*

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contractual or business relationship between the Tribe and Shell Oil Company involving possible development of an on-reservation coal mine. Pet. App. 38-42 (FOF ¶¶ 66-81); *id.* 54-57 (COL ¶¶ 36-46). This aspect of the district court's judgment was affirmed on appeal (Pet. App. 12-14), and the Tribe's cross-petition for writ of certiorari on the issue has been denied (*Crow Tribe v. Montana*, 118 S. Ct. 73 (1997)).

requirements for relief under theories of assumpsit or constructive trust; that is, even though there was no privity and even though the Tribe itself had not paid the taxes to the State." *Id.* at 828 (Pet. App. 8) (emphasis added). The court next found mistaken petitioners' reliance on *United States v. California*, 507 U.S. 746 (1993). The court distinguished that decision in a footnote which, as modified in response to Montana and Big Horn County's petition for rehearing, stated in part:

> California could only be liable if it were somehow responsible for the wrongful act of a third party and there was no finding that California had wrongfully or illegally collected taxes. In this case, however, the illegality of Montana's taxes was established in *Crow I* and *Crow II*; Montana need not be held responsible for another party's wrongdoing for liability to attach. . . .
>
> *California* involved an entirely different factual situation: a claim of restitution by the Government where the Government had voluntarily agreed to reimburse a contractor subject to a state tax. The Government, unlike the Tribe, was "in no better position than as a subrogee of its contractor," . . . and the Supreme Court held that "the Government cannot use the existence of an obligation to indemnify [a contractor] to create a federal cause of action for money had and received to recover state taxes paid by [the contractor].

Crow IV, 92 F.3d at 828 n.2 (Pet. App. 8-9, 16) (citations omitted).

SUMMARY OF ARGUMENT

I. Respondents initially sought recovery of Westmoreland's severance and gross proceeds tax payments under a common law claim for money had and received, or quasi-contract. That claim has been foreclosed by this Court's unanimous decision in *United States v. California*, 507 U.S. 746 (1993). There, this Court held that the United States could not maintain a quasi-contract claim with respect to state taxes imposed on a federal contractor and for which the contractor was reimbursed contractually by the United States. It reasoned in relevant part that the United States' obligation to reimburse the federal contractor for tax payments did not give rise to a claim in quasi-contract on the Government's part against California and that the relationship between California and the actual taxpayer was adverse – i.e., "that of creditor and debtor." *Id.* at 756. Under those circumstances, the Court refused to "imply [the] contract in law between California and the Government" necessary to establish a quasi-contractual relationship.

California applies with full force here. Like the federal contractor there, Westmoreland not only was the taxpayer but also "has had its day in court and gone home" (*California*, 507 U.S. at 752) by paying the state taxes without initiating state-law refund procedures and by entering into a settlement agreement with petitioners. Like the federal contractor, moreover, Westmoreland did not steal money from the Tribe and pay it to petitioners. The relationship between petitioners and Westmoreland instead was "adverse" in the same fashion as the relationship between the State and the taxpayer in *California*.

The reasons which the Ninth Circuit offered to distinguish *California* do not withstand even cursory scrutiny. The court of appeals relied on the fact that the California tax had not been deemed unlawful, while the Montana taxes have been held preempted, but that fact was immaterial to whether a viable quasi-contract claim was stated. Although it is clear the allegation that California had acted illegally in assessing the tax was central to the United States' complaint (507 U.S. at 749), the Court did not need to reach the issue because of its ruling that there was no cause of action available for the United States to proceed, even were the State's tax manifestly illegal. No less unhelpful was the court of appeals' other basis for distinguishing *California*: respondents had not sought to recover Westmoreland's tax payments as the latter's assignees or subrogees. The absence of such a claim instead removes the very basis upon which the United States sought quasi-contract recovery in *California* and, if anything, renders respondents' quasi-contract claim here even weaker than the United States' there.

II. Tellingly, respondents abandon entirely the reasoning offered by the Ninth Circuit and advance two different arguments as to why *California* does not apply here. First, respondents contend that *California* extends only to quasi-contract claims with respect to taxes alleged to be unlawful under state, as opposed to federal, law. This is an irrelevant distinction. The difficulty with the quasi-contract claim in *California* was not that it was based on state law but that the relationship between the United States and the State was not one that would allow the United States to recover taxes it did not pay.

Respondents alternatively attempt to justify the Ninth Circuit's judgment on the theory that the federal courts have inherent equitable remedial authority to award the relief sought here. As an initial matter, the remedy sought by respondents – an order forcing petitioners to turn over nearly $58 million in taxes collected long ago and prejudgment interest exceeding $300 million – is plainly legal, not equitable, in nature. And even assuming that such quasi-contract relief is equitable in nature, this Court has held that the exercise by federal courts of equitable remedial powers must be informed by, and be consistent with, common law principles. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1945). Any other rule means "us[ing] each equity chancellor's conscience as a measure of equity, which . . . would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot." *Lochner v. Thomas*, 116 S. Ct. 1293, 1298 (1996). Here, the only common law remedy available to recover the severance and gross proceeds taxes paid to petitioners lay in quasi-contract, and that remedy is foreclosed by *California*.

Aside from the utter irreconcilability of respondents' equitable authority argument with *California* and this Court's more general teaching on the use of such power, the federal-state comity principles underlying the Tax Injunction Act, 28 U.S.C. § 1341, counsel strongly against the existence of the virtually unfettered equitable discretion urged by respondents. *See, e.g., National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995). It is undisputed that they seek recovery of taxes paid by

another who had state-law remedies which were "plain, speedy and efficient" under § 1341 but bypassed those remedies. Permitting respondents to short-circuit those remedies cuts deeply into the salutary objective of § 1341 that recovery of taxes alleged to have been collected unlawfully occur in accordance with the involved State's internal procedures. This conclusion additionally is warranted by *National Private Truck Council* and *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981), where the Court refused to extend the reach of 42 U.S.C. § 1983 to taxpayer claims in federal or state court in the face of adequate state-law remedies. It would be anomalous to conclude that a *nontaxpayer* can achieve the same result through exercise of a federal court's inherent equitable powers.

Finally, respondents' theory is particularly dangerous not only because it imposes a draconian, new form of liability on petitioners (and presumably on States in general) but also because it establishes an essentially standardless analysis by which the liability will be determined. Any finding of preemption thus would give rise to liability for taxes paid by a third party based solely on each court's individual notions of equity, unguided by any traditional common law standards. Such a result is untenable. This Court has long recognized the need for reasonably certain outcome-determinative rules where state Indian country taxation authority is at stake. For example, in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), it rejected the court of appeals' adoption of an ad hoc approach for determining the taxability of tribal fee-owned property,

remarking that "[i]f the Ninth Circuit's . . . test were the law, litigation would surely engulf the states' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel." *Id.* at 267-68. The panel's approach invites just such a complex, case-by-case weighing of poorly defined considerations by the district courts that, as demonstrated by its own ruling, would be subject to wholesale revision by appellate courts with a different view of how the equities should be assessed.

ARGUMENT

I. UNDER THIS COURT'S DECISION IN *CALIFORNIA*, RESPONDENTS CANNOT MAINTAIN A QUASI-CONTRACT CLAIM FOR RECOVERY OF THE STATE TAXES PAID BY WESTMORELAND.

The Ninth Circuit's decision allowing respondents to recover $58 million in taxes paid by Westmoreland to petitioners departs radically from settled principles governing recovery of taxes alleged to have been exacted unlawfully and effectively negates the procedures that Montana, and other States, have established to determine claims to such recovery. In an area of law where predictability of process is essential to maintaining the States' fiscal integrity, the court of appeals has introduced enormous uncertainty. The Ninth Circuit's decision, however, is not merely without precedent and potentially disruptive of state tax refund procedures; it is directly contrary

to this Court's decision in *United States v. California*, 507 U.S. 746 (1993).

A. This Court's Decision in *California* Properly Applied Well-Established Common Law Principles and Held There Is No Cause of Action in Quasi-Contract to Recover Taxes Paid by a Third Party.

In opposing the motion for summary judgment filed in 1989 with respect to the fourth amended complaint, the Tribe characterized as "legalistic" petitioners' argument that only Westmoreland could recover the severance and gross proceeds taxes it had paid and commented that "[f]ortunately the equitable basis for money had and received and the equitable remedy of constructive trusts are available to prevent the injustice Defendants seek to establish." CR 503 at 19. The United States was equally explicit. CR 506 at 6 ("[t]here are two principal theories upon which we rely in asserting our right to restitution: a common law count of money had and received and the imposition of a constructive trust"). Respondents' reliance on quasi-contract theory is revealing and underscores what is now apparent after this Court's decision in *United States v. California*, 507 U.S. 746 (1993): They pursued a theory of recovery that was untenable from the inception.

1. The doctrine of quasi-contract developed as a system for awarding restitution in cases where neither tort nor contract remedies existed. It was based on the common law action for assumpsit – the enforcement of a promise. Although originally developed to enforce an

actually bargained for contract, assumpsit was subsequently expanded to include situations where a contract should be implied between parties as a matter of law. *See* Dan B. Dobbs, *Law of Remedies* § 4.2(d) (1993); Peter W. Davis, Comment, *Restitution: Concept and Terms*, 19 Hastings L.J. 1167 (1968); *see also Baltimore & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923) (a "*quasi* contract" is a "fiction of law" whereby "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress"). By 1760, Lord Mansfield had established "unjust enrichment" as the basis for such actions. *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760) ("the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money"). "Although [Lord] Mansfield's description of quasi contract as 'equitable' has been repeated many times, this refers merely to the way in which a case should be approached, since it is clear that the action is at law and the relief given is a simple money judgment." I George E. Palmer, *Law of Restitution* § 1.2, at 9 (1978).

As developed by the common law courts, quasi-contract principles did not give courts authority to remedy every claim of injustice, but remained "tied to the action in assumpsit and to the limited judicial powers of law judges." Dobbs at 581. In order to maintain an action for quasi-contract, a plaintiff has the burden of proving (1) a benefit conferred by the plaintiff to the defendant; (2) acceptance of the benefit by the defendant; and (3) that it would be unjust and inequitable for the defendant to retain the benefit conferred. *Restatement of Law of Restitution*, § 1, cmts., a & c (1937). A claim accordingly will lie in

quasi-contract only when the plaintiff can demonstrate a relationship with the defendant sufficient to allow a court to imply a contract between the parties that obligates the defendant to repay a benefit conferred by the plaintiff.

Claims in quasi-contract were eventually recognized at common law by this and other courts as a means for recovering illegal taxes paid under duress and protest. *See, e.g., Stone v. White*, 301 U.S. 532, 534 (1937); *City of Philadelphia v. Collector*, 72 U.S. 720, 731-32 (1866); *see generally* II Palmer § 9.16; Thomas M. Cooley, *Law of Taxation* 1487-90 (Albert Poole Jacobs ed., 1903). Recovery under this theory, however, was limited to the "payor." *Restatement of Restitution* § 75. The common law theory of recovery has been displaced in whole or part by many States, including Montana, with explicit statutory schemes that control recovery of taxes alleged to have been exacted unlawfully. II Palmer § 9.16, at 337.

2. It was against this basic framework that *California* was decided. There, the United States sought to recover $11 million in sales and use taxes alleged to have been assessed erroneously under state law on a government contractor, WBEC. 507 U.S. at 749. The contractor was compensated on a fixed-fee-plus-costs basis and reimbursed for the taxes through an "advanced funding" procedure under which it withdrew funds deposited into an account by the Government for the purpose of paying allowable costs, which included taxes. *Id.* The total amount of taxes claimed to have been assessed improperly was $14 million, and WBEC previously had settled its challenge to the assessment for $3 million and dismissed related state court refund actions without prejudice. *Id.*

The Court began its substantive analysis by noting the early use of the indebitatus assumpsit cause of action as a means for recovery of illegally imposed taxes, its replacement on the federal level by administrative and judicial remedies, and the fact that in prior cases only the actual taxpayer had advanced the quasi-contract claims. 507 U.S. at 751-52. The situation in *California* differed, however, because it was WBEC, not the United States, which was the taxpayer. The United States attempted to overcome this distinction by claiming that its obligation to reimburse WBEC created a quasi-contractual relationship with California so as to allow recovery.

This Court, however, found that distinction critical and unanimously rejected the United States' claim. It held that "[i]n this case . . . the taxpayer – WBEC – has had its day in court and gone home. The United States attempts to recover money it paid in reimbursement for state tax assessments against the contractor, even though the contractor already has challenged the assessment and accepted a resolution of its claims." 507 U.S. at 752. Consequently, even though it was obligated to indemnify WBEC, "the Government [could not] use the existence of [that] obligation . . . to create a federal cause of action for money had and received to recover state taxes paid by WBEC." *Id.* at 754.

The Court then found "inapposite" the Government's reliance on *Bayne v. United States*, 93 U.S. 642 (1877), and *Gaines v. Miller*, 111 U.S. 395 (1884), which the United States contended stood for the proposition that it could recover in quasi-contract funds from a third party that "had been misappropriated from a government agent." 507 U.S. at 754-55. The Court explained those cases

"share[d] two features this case lacks": first, "the money passed from the first party [complainant] to the second party unlawfully;" and, second, "the rightful owner sued a third party who had a relationship that . . . made that party legally responsible for the actions of the one who unlawfully took the money." *Id.* This Court further explained why the absence of these features was controlling for purposes of determining the existence of a viable quasi-contract claim:

> The Government does not contend that WBEC stole the money at issue in this case or otherwise took the money from the Government unlawfully. WBEC did not. Nor does the Government contend that California and WBEC had a relationship that would make California liable for WBEC's actions. They did not. In fact, California and WBEC had an adverse relationship: that of creditor and debtor. California's demand that WBEC pay what California believed to be a lawful debt does not make California legally responsible for the Government's indemnification of WBEC. In these circumstances, we do not imply a contract in law between California and the Government. Without an implied contract, an action for money had and received will not lie against the State.

Id. at 756. The Court thus held in *California* that federal common law quasi-contract recovery is not available to a nontaxpayer, even where actual reimbursement has occurred, because two separate relationships are involved and because the taxing entity cannot be held responsible for whatever obligations the taxpayer may have with a third party.

B. This Case is Indistinguishable from *California*.

Application of *California* here is straightforward. First, like the United States in *California*, respondents alleged a quasi-contract cause of action to recover taxes they had not paid. Second, as in *California*, the party that actually paid the taxes "has had its day in court and gone home." 507 U.S. at 752. Westmoreland thus paid all of the taxes at issue without initiating any tax protest under the procedures provided by Montana law. Indeed, it entered into a settlement agreement with the petitioners where, in return for $50,000 consideration, it expressly waived any claim it might have against petitioners regarding the coal taxes.[5]

Third, just as in *California*, the *Bayne-Gaines* factors are not satisfied. Neither *Bayne* nor *Gaines* controlled the

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[5] There has been, and can be, no dispute that Westmoreland bore the legal incidence of the taxes and was the taxpayer. *Commonwealth Edison Co. v. Montana*, 615 P.2d 847, 850 (Mont. 1980), *aff'd*, 453 U.S. 609 (1981) ("the coal producers have the only vital stake in this case because they . . . are in fact the taxpayers"); *accord Crow I*, 650 F.2d at 1110 (Pet. App. 178, 179); *see generally* Walter Hellerstein, *State and Local Taxation of Natural Resources in the Federal System* 7-13 (1986) (discussing the early twentieth century controversy over the merits of production value-based as opposed to ad valorem in situ-based taxation of mineral extraction). The Tribe's position with respect to the Montana taxes accordingly was comparable for quasi-contract purposes to the United States' in *California*; i.e., the taxes did not invade the *Tribe's* immunity from state taxation, just as the California tax did not invade the United States' immunity. *See United States v. New Mexico*, 455 U.S. 720 (1982); *Ute Indian Tribe v. State Tax Comm'n*, 574 F.2d 1007 (10th Cir.), *cert. denied*, 439 U.S. 965 (1978).

outcome in *California* because WBEC had not stolen the money it used to pay the taxes and because WBEC and the State had an "adverse relationship." The same is true here. Westmoreland did not steal money from the Tribe and pay it to petitioners. Likewise, Westmoreland as a taxpayer had an adverse relationship to petitioners. In fact, Westmoreland intervened early in the litigation to support the Tribe's challenge to the State coal taxes (*see, e.g.*, J.A. 105), going so far as to file in November 1982 a joint motion requesting an order directing their deposit into the district court's registry and a supporting brief. CR 114, 115. Westmoreland, in short, was a highly sophisticated economic actor whose conduct was directed at protecting its own interests.

C. The Ninth Circuit's Effort at Distinguishing *California* Does Not Withstand Scrutiny.

The court of appeals found *California* inapposite for two reasons: "there was no finding that California had wrongfully or illegally collected taxes," and the earlier case "involved an entirely different case" where the "Government, unlike the Tribe, was 'in no better position than as a subrogee of its contractor.' " *Crow IV*, 92 F.3d at 828 n.2 (Pet. App. 8 & 16). Neither justification for refusing to hold *California* controlling is tenable.

That California had not been determined to have assessed WBEC's property unlawfully before summary judgment was granted the State was immaterial to whether a viable quasi-contract claim existed. The Government contended WBEC had been assessed improperly under state law, but its claim for relief was rejected by

each federal court reviewing the claim for reasons unrelated to whether California taxing officials in fact had erred in their assessment. *California*, 507 U.S. at 749-50; *United States v. California*, 932 F.2d 1346, 1347 (9th Cir. 1991), *aff'd*, 507 U.S. 746 (1993). Instead, insofar as the United States' quasi-contract claim was involved, the decision turned on the settled common law principles that were unconcerned with the validity of the assessments. There was consequently no need to reach the question of whether the California tax had been imposed improperly because, even had the United States' allegation been true, the Government still lacked a viable cause of action.

The panel's second attempt to distinguish *California* fares no better than the first. If anything, respondents' claim is even *weaker* than the United States' claim in *California*. There, the United States at least could claim subrogation rights because of its contractual obligations to WBEC. 507 U.S. at 756-59. This Court nonetheless ruled against the United States on that basis, holding that " 'the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assigner, which public policy does not forbid.' " *Id.* at 758 (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 142 (1938)). Here, in stark contrast, a subrogation claim neither has been asserted nor could be asserted in the absence of reimbursement of Westmoreland by the Tribe for the severance and gross proceeds tax payments. The Tribe instead made *no* contribution to Westmoreland's tax payments; if any entity here was even remotely comparable to the United States in *California*, it was Westmoreland's utility customers to whom the taxes were passed

on contractually. Therefore, even had Westmoreland instituted a successful refund proceeding, the Tribe would have not been entitled to any share of the refund. The suggestion by the Ninth Circuit that the respondents' position is somehow enhanced by their disclaiming any intent to stand in Westmoreland's shoes stands *California* – and logic – on its head.

II. RESPONDENTS CANNOT EVADE *CALIFORNIA* ON THE GROUNDS THAT A VIOLATION OF FEDERAL LAW IS CLAIMED AS THE BASIS FOR QUASI-CONTRACT RELIEF OR THAT A REFUND OF WESTMORELAND'S TAXES WAS AN APPROPRIATE EXERCISE OF THE NINTH CIRCUIT'S EQUITABLE REMEDIAL DISCRETION.

Declining to defend the court of appeals' rationale, respondents first argue that *California* is inapposite because it turned on the issue of "whether the Court should recognize a cause of action under federal common law permitting the United States to recover state taxes it claimed its contractor should not have been required to pay as a matter of *state law*." U.S. Opp'n 15 (emphasis added); *see also* Tribe Opp'n 19-20. Hence, respondents claim that *California* does not apply because "unlike the present case, *California* involved a state tax that was not claimed to violate federal law." U.S. Opp'n 16. They next argue that *California* is not dispositive because what is involved here is merely an appropriate exercise of a federal court's inherent power to award equitable relief. Neither theory is any more persuasive than the Ninth Circuit's efforts at escaping the reach of *California*.

A. The Fact That *California* Involved a Tax Alleged Invalid Under State, Rather Than Federal, Law is Irrelevant.

Respondents' argument that *California* creates, in essence, a rule precluding federal common law quasi-contract recovery only where a state law violation is at stake suffers from the same flaw as the Ninth Circuit's view that *California* is inapplicable because there no violation of law had been established. The distinction respondents offer is simply irrelevant, and it is therefore unsurprising that they were unable to cite any language from *California* indicating that the Court considered such a difference to be pertinent, let alone dispositive. Rather, as explained above, what mattered to this Court in *California* was that WBEC had an "adverse" relationship with California and the State's demand that WBEC pay its taxes did not create an obligation for the State to indemnify the United States – facts that are equally true here. *California*, 507 U.S. at 756 ("[i]n these circumstances, we do not imply a contract in law between California and the Government. Without an implied contract, an action for money had and received will not lie against the State").

Respondents' argument also is opposed diametrically to that the United States advanced in its *California* submissions to this Court. There, it argued that "[t]he court of appeals erred in suggesting . . . that the fact the federal claim is for recovery of taxes that are unlawful under state law, rather than under federal law, is of relevance to this case," since "[t]he federal cause of action for money had and received applies whenever federal funds have been 'wrongfully, erroneously, or illegally paid.' " Brief

for United States at 24, *United States v. California*, *supra* (No. 91-2003); *see also id.* ("[t]he remedy [of money had and received] is not limited to situations where the State's action violates the Constitution"). The Government was correct in *California* in this respect, and the Court should squarely reject its new litigation posture.

B. Federal Courts Cannot Circumvent *California* by Purporting to Exercise Their Inherent Equitable Authority.

Respondents' erroneous belief that *California* is inapposite because it did not involve a tax that was illegal under federal law also infects their alternative argument that *California* is distinguishable because this case simply concerned the authority of the federal court to award relief once a claim has been proven. *See, e.g.*, U.S. Opp'n 17 ("The relief granted to the Tribe is properly understood as an exercise of the broad equitable authority of the federal courts to remedy violations of federal law."); Tribe Opp'n at 17 ("The Ninth Circuit simply did what federal courts have been doing '[f]rom the earliest years of the Republic,' exercising their equitable powers to remedy the invasion of federally secured rights."). Even if this Court assumes the relief awarded here is "equitable" in nature – and it is not – this Court's decisions discussing the scope of a federal court's discretion in fashioning such relief provides no basis for respondents' extravagant claim. This is particularly true where, as here, the relief ordered concerns core issues of state sovereignty and the structure of "Our Federalism" which lies at the heart of the Constitution.

1. By arguing that the panel's decision was simply an exercise of the court's equitable powers, respondents have attempted to distract this Court from the fact that the relief they originally sought was legal in nature. As explained above, quasi-contract was a form of action that developed at *law*, not in equity, to remedy a breach of a judicially implied contract. *See also* John P. Dawson, *Unjust Enrichment* 10-26 (1951). That the remedy awarded by the court of appeals is legal, rather than equitable, is clear on its face: The court not only ordered respondents to pay $58 million in funds that have long since been collected and largely spent but also directed the district court to resolve respondents' claim to over $300 million in prejudgment interest.[6]

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[6] Even the Ninth Circuit did not purport to award "equitable relief." Although its opinion stated that the court was deciding the case by "the process of weighing the equities in favor of and against restitution" (*Crow IV*, 92 F.3d at 828 (Pet. App. 8)), this description appears to have referred to the panel's analytical approach to resolving the merits of the case rather than the true nature of the remedy awarded. Nevertheless, to the extent the contrary may be true, it remains settled that quasi-contract is an action at law. Respondents' request for a constructive trust additionally did not alter the substantive claim at issue here, since imposition of a constructive trust is properly viewed as a form of remedy, not a substantive cause of action, through which specific property is returned to the rightful owner. *See generally* I Palmer § 1.4 at 17; *Restatement of Restitution* § 160, cmt. a. As discussed earlier, over 60 percent of the severance taxes and all of the gross proceeds taxes were spent immediately, a fact at the least making a constructive trust an inappropriate vehicle for requiring "disgorge[ment]" of the *entire* $58 million in taxes paid by Westmoreland or directing the district court to consider the prejudgment interest claim on remand. Even as to a traceable corpus, a plaintiff suing in

The availability of a legal remedy is dispositive. Because there was a well-established legal remedy for the harm of which they complained, respondents are not entitled to equitable relief. "It is a fundamental principle of long standing" that a court cannot grant equitable relief "as long as an adequate remedy at law is available." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 n.22 (1985); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-81 (1992) ("[i]t is a basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law") (citations omitted). Put simply, a complainant is not entitled to request a court to exercise its equitable powers simply to relieve it of the burden of meeting the requirements of an existing, available legal cause of action. Here respondents repair to notions of equitable relief precisely because they have tried, and failed, to establish any entitlement to precisely the same relief under a claim arising at law.

2. Even if the quasi-contract relief sought by respondents could be considered as equitable in nature, however, they have failed to prove the predicates for such relief. Their theory of recovery consequently can succeed only if they are correct in asserting that a federal court may award relief of the kind sought here whenever, in the exercise of its discretion, it believes "disgorge[ment]" of

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constructive trust must satisfy the same elements that condition quasi-contract relief and is entitled only to a constructive trust remedy when the legal relief available in quasi-contract is inadequate. *Restatement of Restitution* §§ 1.3, cmt. c & 160, cmt. e.

taxes to a nontaxpayer will avoid an unfair result notwithstanding the inability of the taxpayer itself to recover the taxes. Although the United States characterizes this claim as "nothing novel" (U.S. Opp'n at 19), it is squarely contrary to this Court's precedent and well-established equity jurisprudence.

It is axiomatic that although "[t]he remedial powers of an equity court must be adequate to the task . . . they are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Rather, "the scope . . . of relief is dictated by the extent of the violation *established*." *Califano v. Yamasaki*, 443 U.S. 682, 701 (1979) (emphasis added); *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 418 (1977); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 22-23 (1971). And where, as here, the equitable remedy will "intrude into the proper sphere of the States," particularly its taxation activities, a court's equitable power should be exercised "only sparingly, subject to clear rules guiding its use." *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring).

Applying these principles, this Court has held that even when a federal right is shown to have been violated, "it by no means follows that the plaintiff . . . is relieved of the burden of establishing the traditional prerequisites to relief." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 63 (1975). Hence, "the conclusion that a private litigant could maintain an action for violation of [a federal statute] mean[s] no more than that traditional remedies [are] available to redress any harm which he may have suffered; it provide[s] no basis for dispensing with the showing required to obtain relief." *Id.*

In reaching this holding, the Court relied upon *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), where the issue was the availability of rescission and restitution of consideration paid as a remedy under the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa, for the alleged fraudulent sale of securities. It found the remedy available because "the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce . . . in designated courts by such legal or equitable actions as would normally be available to him." *Id.* at 287-88. Consequently, after noting the authority of specified courts under 15 U.S.C. § 77v(a) to entertain all suits in equity or at law to enforce the statute, the Court reasoned that "[i]f [the complainant's] bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit, providing the bill contains the allegations the Act requires." *Id.* at 288. The Court then reviewed the complaint's allegations and determined, inter alia, that they satisfied common law standards for rescission on the basis of fraud. *Id.* at 288-89.

And just last year, this Court in *Lochner v. Thomas*, 116 S. Ct. 1293, 1298 (1996), held that simply because a court is exercising its equitable powers, it cannot "ignore [the relevant] body of statutes, rules and precedents." Instead, the Court made clear that "courts of equity must be governed by rules and precedents no less than courts of law." *Id.* (quoting *Jenkins*, 515 U.S. at 127 (Thomas, J., concurring)). "[T]he alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot."

Id. (citing 1 J. Story, *Commentaries on Equity Jurisprudence* (13th ed. 1886)); *cf. Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (holding that in a damages action brought under 42 U.S.C. § 1983, common law rules of tort " 'defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry' ") (quoting *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)).

In sum, a federal court's remedial powers, even when federal constitutional or statutory provisions are alleged to have been violated, must be exercised by reference to standards rooted in history and tradition. Here, respondents ask this Court to fashion a remedy not merely without precedent but also in utter conflict with the most apposite decision of this Court, which itself is based on a rich history of quasi-contract law.[7]

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[7] This Court's statement in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-67 (1992), that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," relied on heavily by respondents (U.S. Opp'n 16-17; Tribe Opp'n 17, 21-22), is not to the contrary. The issue here is whether the remedy respondents did seek and the Ninth Circuit granted – quasi-contract recovery of Westmoreland's tax payments – *is* "available." The mere fact that the Tribe could have been injured economically in some amount which for strategic reasons respondents made no attempt to prove does not mean, as is seemingly their argument, that they are entitled to Westmoreland's tax payments. And as explained above, they wholly fail to meet the standards for such relief as spelled out in this Court's decision in *California*.

3. The unprecedented expansion of federal court equitable remedial authority advocated by respondents is singularly pernicious in the context of what, in practical effect, is a tax refund claim. In liberally applying the Tax Injunction Act, 28 U.S.C. § 1341, this Court long has recognized judicial and congressional "aversion to federal interference with state tax administration." *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995); *see also Arkansas v. Farm Credit Servs. of Cent. Ark.*, 117 S. Ct. 1776, 1779 (1997); *California v. Grace Brethren Church*, 457 U.S. 393, 412 (1982); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-99 (1943); *Matthews v. Rodgers*, 284 U.S. 521, 524 (1932); *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975) (when "confronted with requests for [equitable] relief [with respect to core state functions], [Article III courts] should abide by standards that go well beyond those of private equity jurisprudence"). Section 1341 and the federal-state comity principle animating it thus are concerned with protecting "[t]he States' interest in the integrity of their own [tax refund] processes." *Farm Credit Servs.*, 117 S. Ct. at 1780. Regardless of the inapplicability of § 1341's jurisdictional bar to the Tribe's or the United States' claims (*Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-75 (1976); *Department of Employment v. United States*, 385 U.S. 355, 358 (1966)), the statute's underlying purpose of preventing unnecessary federal court intervention into state taxation matters would be directly frustrated by accepting respondents' view of the federal judiciary's remedial powers.

It is undisputed that respondents are seeking taxes paid by an entity whose own claims were precluded from federal court resolution because "a plain, speedy and efficient remedy [could have been] had in the courts" of Montana. It is additionally undisputed that, had Westmoreland pursued those remedies and recovered its severance and gross proceeds tax payments, the claims here neither could nor would have been brought. In a real sense, therefore, the recovery sought by respondents is derivative of the very fact that Westmoreland's claim to the taxes has been foreclosed by, inter alia, its failure to follow state law refund statutes. To permit respondents to short-circuit these statutes runs squarely contrary to § 1341's underlying policy of allowing States to devise and implement procedures which, consistent with due process or other constitutional constraints, are best suited to avoiding fiscal embarrassment or prejudice and expeditiously resolving taxpayer challenges. *Cf. Bush v. Lucas*, 462 U.S. 367, 388 (1983) (the question is "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue").

This commonsense conclusion is also dictated by the Court's decisions in *Fair Assessment* and *National Private Truck Council*. In *Fair Assessment* the Court held that 42 U.S.C. § 1983 did not authorize taxpayer damages-claim suits in federal court where an adequate state law remedy existed, while in *National Private Truck Council* it determined that taxpayer challenges were not cognizable under 42 U.S.C. § 1983 even if brought in state court for

prospective relief. In the latter case, this Court reasoned that "we must interpret § 1983 in light of the strong background principle against federal interference with state taxation" (515 U.S. at 589) and found the "silence" in § 1341 concerning state court remedial authority "irrelevant" to the outcome of the case because "the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation" (*id.* at 590). It confounds logic to contend, as respondents do, that federal courts should exercise their inherent equitable power to create a remedy for a nontaxpayer that this Court has refused to infer from otherwise broad congressional authorization for suit over claims of constitutional torts. It instead is clear that respondents cannot accomplish through their reliance on the general notions of the federal judiciary's equitable remedial powers that which has been foreclosed under traditional quasi-contract principles in *California*.

4. Finally, under the theory advanced by respondents, a determination that a State tax of Indian country is preempted would permit a court, as a matter of law, to hold a State liable for the taxes paid to it by third parties, with the involved court having the essentially standardless discretion to determine when to order the refund. The remedial power they propose not only is draconian but also does violence to this Court's attempts to establish a measure of certainty in Indian country tax matters.

The complexity associated with preemption issues in Indian country in general, and here in particular, make respondents' theory harsh. Over the past 25 years, this Court has developed a substantial body of decisional authority establishing the standards which are to be used

in determining the validity of state taxes imposed on nonmembers, but only two of these decisions were issued prior to 1975.[8] The Ninth Circuit's preemption analysis in *Crow I* and *Crow II* thus was guided primarily by this Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), handed down five years after the Montana taxes were adopted. Indeed, the case most relevant to the preemption issue here, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), was decided after this Court's summary affirmance of the *Crow II* judgment.

The reasoning in *Cotton Petroleum*, moreover, conflicted directly with that in *Crow II* in at least two important ways. First, this Court recognized in *Cotton Petroleum* that it was "reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate" but

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[8] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982); *California State Bd. of Equal. v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (per curiam); *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indians*, 498 U.S. 505 (1991); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993); *Department of Tax. & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

then reasoned that "any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects . . . is simply too indirect and too insubstantial to support Cotton's claim of pre-emption." 490 U.S. at 186-87. The Ninth Circuit, in contrast, found fault with Montana because it did not "rebut evidence that the taxes had at least some negative impact on the coal's marketability," observed that the district court "did not find the impact of the taxes to be negligible," and concluded that "[a]ny finding of interference . . . would be enough to subject the taxes to preemption." 819 F.2d at 900 (Pet. App. 100). Second, *Cotton Petroleum* made clear that in determining the state governmental services relevant to the preemption issue, all services provided to the affected reservation are appropriately considered and rejected the contention that *White Mountain*'s standards "impose[] a proportionality requirement on the States" (*id.* at 185). The Ninth Circuit, however, limited consideration of the state services relevant to the preemption question to those related to Westmoreland's mining operation, criticizing petitioners for failing to show a "carefully tailored relationship between the severance tax revenues and the coal-related services" (819 F.2d at 901-02 (Pet. App. 104)).[9]

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[9] Petitioners recognize that in *Cotton Petroleum* this Court distinguished in part its summary affirmance of *Crow II* by noting that Montana's "unique" coal taxes had been characterized as "extraordinarily high" by the Solicitor General. 490 U.S. at 186 n.17. Even if the Solicitor General's assessment is accepted, it said nothing about the effect of the taxes on the marketability of Westmoreland's coal or, for that matter, on the marketability of the Tribe's coal in general. The district court, whose factual findings were left undisturbed by the court of

Complicating the preemption analysis here was the threshold question of whether the special Indian country preemption standards applied at all, since the ceded strip lies outside the Crow Reservation (*see supra* note 1), and whether the authorization of state taxation in the 1924 Indian Mineral Leasing Act, 25 U.S.C. § 398, applied to leases entered into pursuant to the 1938 Indian Mineral Leasing Act. The first issue implicated the applicability of a decision of this Court, *Mescalero Apache Tribe v. Jones*, 411 U.S. 164 (1973), that *had* been issued before the taxes were enacted (*see* Pet. App. 155-56 (COL ¶ VI(b))), while the second issue was resolved in *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), seven years after this litigation began.

Petitioners are not suggesting that the summary affirmance by this Court of *Crow II*'s judgment should be reconsidered. They nonetheless do suggest that the preemption issue here was quite complex and that the ultimate outcome of the preemption challenge was, as reflected by the reversals of the district court in *Crow I*

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appeals in *Crow II*, found that there was "no convincing evidence that the state's taxes affected the Crow Tribe's ability to obtain a reasonable royalty from Westmoreland" (Pet. App. 145 (FOF ¶ 123)) and that there was "no convincing evidence in the record that the gross proceeds tax has prevented or impeded the marketing of the Tribe's ceded strip coal" (*id.* 146 (FOF ¶ 129)). Westmoreland's president also testified during the second trial that "he could not identify any utility contracts lost during the relevant time period due to Montana's coal taxes." Pet. App. 29 (FOF ¶ 40). Both the district court and the Ninth Circuit, finally, rejected respondents' claim that the Montana taxes had interfered with the contractual or business relationship between the Tribe and Shell Oil Company with respect to development of on-reservation coal deposits. *Crow IV*, 92 F.3d at 830 (Pet. App. 12-14); Pet. App. 54-57 (COL ¶¶ 36-46).

and *Crow II*, far from certain. Respondents' theory is therefore particularly dangerous because any finding of preemption would give rise to recovery by third parties of monies paid by a taxpayer without protest based solely on the court's individual notions of equity, unguided by any traditional common law standards. Indeed, in this very case, the court of appeals rejected seriatim the district court's "equitable consideration" determinations, but it never overruled any of the lower court's factual findings or announced the substantive standards that should control the decision here. The only inference which can be drawn is that the Ninth Circuit felt that an injustice had been done to the Tribe and that, on balance, respondents rather than petitioners should have Westmoreland's tax payments. That type of reasoning plainly invites the "chancellor's foot" abuse warned against by this Court, since the outcome is controlled by no discernable standards other than the predilections of the particular appellate tribunal's members.

Such a result is untenable. This Court has long recognized the need for reasonably certain outcome-determinative rules where state Indian country taxation authority is at stake. For example, in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), it rejected the court of appeals' adoption of an ad hoc approach for determining the taxability of tribal fee-owned property, remarking that "[i]f the Ninth Circuit's . . . test were the law, litigation would surely engulf the states' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel." *Id.* at 267-68. The panel's approach invites just such a complex, case-by-case weighing of

poorly defined considerations by the district courts that, as demonstrated by its own ruling, would be subject to wholesale revision by appellate courts with a different view of how the equities should be assessed.

CONCLUSION

For the foregoing reasons, the court of appeals' judgment should be reversed.

Respectfully submitted,

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STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

THE CROW TRIBE OF INDIANS and
UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether a federal court, exercising its remedial powers to correct invasions of federally secured rights, may order a state and county to pay the United States as trustee on behalf of the Crow Tribe production taxes that were illegally imposed on the Tribe's coal and collected from the Tribe's lessee when that remedy corrects the wrongs done to the Tribe and effectuates the purposes of the federal laws that were violated.

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OPINIONS BELOW AND JURISDICTION

The Crow Tribe adopts the Opinions Below and Jurisdiction portions of the Petitioners' Brief (at 1-2).

In this brief, the appellate opinions in the instant case, *Crow Tribe v. Montana*, will be referenced as follows: *Crow I* (650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982), *cert. denied*, 459 U.S. 916 (1982), Pet. App. 169, 167); *Crow II* (819 F.2d 895 (1987), *summarily affirmed*, 484 U.S. 997 (1988), Pet. App. 88, 87); *Crow III* (969 F.2d 848 (1992), Pet. App. 58); and *Crow IV* (92 F.3d 826 (1996), *amended*, 98 F.3d 1194 (1996), Pet. App. 1, 15).

STATUTES INVOLVED

This matter presents a question involving the remedial power of federal courts to correct invasions of federally secured rights. In *Crow II*, the Crow Tribe's federally protected sovereignty as well as its rights under the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396g, Pet App. 230-33[1], were held to be violated by the application of Montana's severance and gross taxes, 1975 Mont. Laws Chapt. 525, Pet. App. 234-42, to the Tribe's coal.

STATEMENT OF THE CASE

In 1988, this Court summarily affirmed the decision of the Court of Appeals for the Ninth Circuit holding Montana's severance and gross proceeds taxes on Crow

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[1] The Indian Mineral Leasing Act of 1938 was amended by the Act of September 16, 1959, 73 Stat. 567, and the Act of May 17, 1968, 82 Stat. 123, to remove the exception for the Crow Indian Reservation originally included in section 6 of the 1938 Act, 25 U.S C. § 396f. *See* Pet. App. 181-82 n.6.

coal invalid. *Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988), Pet. App. 87, affirming *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (1987), Pet. App. 88.[2] The court of appeals held that the exorbitantly high state taxes violated the rights of the Crow Tribe under the 1938 Indian Minerals Leasing Act and interfered with the Tribe's federally protected sovereignty. Moreover, it found that Montana had intentionally and illegitimately levied its coal taxes to appropriate most of the economic benefit from tribal coal, *Crow IV*, 92 F.3d at 829, Pet. App. 10; *Crow II*, 819 F.2d at 902, Pet. App. 104-05; *Crow I*, 650 F.2d at 1113, Pet App. 185, and that the taxes "[took] revenue that would otherwise go towards supporting the Tribe and its programs," *Crow II*, 819 F.2d at 902, Pet. App. 107, and "limit[ed] the Tribe's ability to regulate the development of its coal resources," *Crow II*, 819 F.2d at 902-903, Pet. App. 107.

The issue presented in this case is not the validity of the tax but whether the State and County should be allowed to retain the taxes they collected in violation of the Crow Tribe's federally secured rights and at the Tribe's expense, or, as held by the court below, the State and County may be required to pay that money to the United States in trust for the Crow Tribe. The specific question presented in the petition for certiorari is whether that disgorgement remedy in favor of the Tribe is barred because the illegal taxes were paid by the Tribe's lessee, Westmoreland Resources, not by the Tribe.

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[2] This Court's summary affirmance subsequently was reaffirmed in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 and n.17 (1989).

A. Factual Background

In 1974, the Crow Tribe ("Tribe") renegotiated a 1972 coal lease with Westmoreland Resources (Westmoreland). Both the original and renegotiated leases were made pursuant to the Mineral Leasing Act of 1938, 25 U.S. §§ 396a *et seq.*, and were approved by the Secretary of the Interior. Production began in late 1974. Pet. App. 30.[3]

In April 1975, Montana enacted statutes imposing severance and gross proceeds taxes on all coal produced within the State with no exceptions for Indian coal. Pet. App. 234, Mont. Code Ann. §§ 15-35-101 to 111, 15-23-701 to 704. The rate of the severance tax charged on Crow coal produced during the 1975-1982 period at issue in this case was 30% of the value of the contract sales price of the coal, Pet. App. 25, and the gross proceeds taxes added another 5%, Pet. App. 25-26. The effective rate of the combined taxes exceeded 32.9% of the coal's contract sales price after taking allowable deductions and adjustments into account, "more than twice that of any other state's coal taxes." *Crow II*, 819 F.2d at 899 n.2, Pet. App. 98; *Cotton Petroleum*, 490 U.S. at 186 n.17.

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[3] The lease was on tribal coal in an area known as the "ceded strip", just north of the northern surface boundary of the Reservation. Most of the coal and some of the surface of this area, once ceded, had been restored to the Tribe and returned to reservation status by the Act of May 19, 1958, 72 Stat. 121, which provided that:

> Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made part of the existing reservations for such tribe or tribes.

Tribal representatives appeared before the Montana legislature during its consideration of the proposed new coal taxes and strongly opposed their imposition on Indian owned coal on the grounds that:

> (1) they are so out of line with taxes imposed by other neighboring states that Crow coal will no longer be competitive and therefore our coal development program will suffer, and (2) . . . the taxes bear no relation to the responsibilities and burdens which coal development has imposed on the State of Montana . . . [and 3] . . . this level of taxation is so high that [it] becomes an unauthorized state interference with federally secured Indian property.

J.A. 53, 56-57. The Tribe proposed a compromise to the legislature under which coal producers would receive a credit against state taxes for coal taxes paid to Indian tribes. The Montana Senate Taxation Committee rejected the Tribe's proposal, commenting that "there would have to be court decreed settlements regarding Indian coal revenues." J.A. 59. *See Crow IV*, 92 F.3d at 829, Pet. App. 9; Pet. App. 23.

In enacting its coal taxes, the Montana legislature found that strip-mined coal is in sufficient demand that "[a]t least one-third (1/3) of the price it commands at the mine may go to economic rents of royalties and production taxes. . . . " Pet. App. 235, Mont. Code Ann. § 15-35-101(1)(e). In *Crow I*, 650 F.2d at 1113, Pet. App. 185, the court of appeals quoted this legislative finding and concluded "that [b]y setting the severance tax rate at 30 percent of value, Montana made plain its intention to

appropriate most of the economic rent."[4] *See also, Crow II*, 819 F.2d at 902, Pet. App. 104-05; *Crow IV*, 92 F.3d at 829, Pet. App. 10 ("we had . . . found [in *Crow I* that] the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal on the ceded strip").

The Tribe enacted its own 25% severance tax in early 1976. J.A. 79. The tribal tax was approved by the Interior Department for coal beneath the surface boundaries of the Reservation but purportedly not as to the Tribe's coal in the ceded strip. Interior's decision not to approve the Tribe's tax as applied to its ceded strip coal was based on its belief at that time that that coal could not be taxed under the Tribal Constitution because it was not part of the Crow Reservation. Pet. App. 19, 31; *Crow I*, 650 F.2d at 1107-08 & 1115 n.19, Pet. App. 172, 192; *Crow II*, 819 F.2d at 897, Pet. App. 93.

It was subsequently determined in *Crow II* that the Tribe's minerals within the ceded strip are part of the Crow Reservation. 819 F.2d at 896-98, Pet. App. 91-95; *supra* at 3 n.3. The United States acknowledged, and the district court found, that the Interior Department's purported disapproval of the Tribe's tax as applied to its ceded strip coal was mistaken and without effect. Pet. App. 36; J.A. 286; U.S. Sup. Ct. Br. in Opposition at 4, 21 n.11; U.S. Ninth Cir. Br. at 19-21; U.S. Ninth Cir. Reply Br. at 6; Pet. App. 31, 36, 69, 78. As the district court explained, the Department's approval of the tax as applied to coal produced within the Reservation "was

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[4] " 'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." *Crow I*, 650 F.2d at 1113 n.12, Pet. App. 185.

necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow tribal coal" in the ceded strip, since that coal also was part of the Reservation. J.A. 286. Consequently, "at all relevant times the Tribe had a valid coal mining tax applicable to Westmoreland's mining on the ceded strip." Pet. App. 36; J.A. 286.[5]

Westmoreland began paying Montana's new coal taxes in 1975. It paid $46.8 million to the State between 1975 and 1983 and $11.4 million to the County between 1976 and 1986. Pet. App. 23-27.[6] The taxes paid to the State and County were not protested and Westmoreland did not initiate proceedings to recover refunds. Westmoreland later entered into an agreement waiving any claim to a refund. Pet. App. 22, 37.

No coal taxes were paid to the Tribe prior to 1987. Pet. App. 31, 35. During a portion of the period prior to 1982, Westmoreland paid coal taxes of $27 million to the State and $3 million to the County while paying approximately $8 million in royalties to the Tribe. *Crow I*, 650 F.2d at 1107, Pet. App. 172. Thus, the State and County received almost four times more revenue from the Tribe's coal than the Tribe.[7]

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[5] There is no claim or evidence that Montana or Big Horn County ever detrimentally relied on either Interior's purported disapproval of the Tribe's 1976 tax as applied to the tribal coal mined by Westmoreland or on the Tribe's subsequent, unsuccessful efforts to amend its Constitution.

[6] Westmoreland began paying the severance taxes into the district court's registry in 1983 but the gross proceeds taxes were paid to Big Horn County until the *Crow II* decision in 1987. *See infra* at 7, 11-12 & n.9.

[7] The actual disparity was greater because these figures and percentages do not take account of the property, income and resource indemnity taxes Westmoreland paid to Montana and Big Horn County that were not challenged by the Tribe or the United States. *See infra* at 8-9 & n.8.

The Tribe initiated discussions with Westmoreland in 1976 seeking payments in addition to the royalties required under the 1974 amended lease. Westmoreland's position was that "any additional payment to the Tribe would have to be in lieu of, rather than in addition to, the state tax." J.A. 87; *Crow IV*, 92 F.3d at 830, Pet. App. 12. Westmoreland was willing to pay one tax or the other, but not both, and it did not matter to Westmoreland which jurisdiction received those payments. J.A. 397. Westmoreland's president testified that having to pay double taxes would have resulted in the closure of the mine which would have been devastating both to Westmoreland and to the Tribe. J.A. 87, 391-94, 400.

In 1982, the Tribe and Westmoreland agreed on a tax amendment to their lease. Under that amendment, which was approved by the Interior Department, Westmoreland agreed to pay the Tribe taxes equal to Montana's severance and gross proceeds taxes, and the Tribe agreed to give Westmoreland a credit for severance and gross proceeds taxes paid to Montana and Big Horn County. In January 1983, the district court issued a preliminary injunction against collection of the state severance tax and allowed Westmoreland to deposit its severance tax payments into an escrow account managed by the court. The same relief was granted as to the gross proceeds tax in November 1987. Pet. App. 31-32, 35.

Approximately $24 million was deposited into the court's escrow account between 1983 and 1987. In 1988, following this Court's summary affirmance in *Crow II* and further district court proceedings described *infra* at 14-15, the district court issued a final judgment distributing the

funds held in escrow, including accrued interest, to the United States in trust for the Tribe. J.A. 292. There was no appeal from that judgment. Since 1988, Westmoreland has paid all severance and gross proceeds taxes on Crow coal directly to the United States in trust for the Tribe pursuant to the 1982 tax amendment. Pet. App. 36. This case concerns only the money illegally collected by Montana and the County before the taxes were paid into escrow.

Neither Montana nor Big Horn County set aside the contested taxes until the district court required that they be paid into its registry. *Crow IV*, 92 F.3d at 829 n.3; Pet. App. 9. But significant portions of all coal severance revenues received by Montana were deposited into the Constitutional Trust Fund established under Article IX, Section 5 of the Montana Constitution. The principal of that Fund may be spent only with the approval of ¾ of the Montana legislature. *Crow I*, 650 F.2d at 1108, Pet. App. 173; Pet. App. 25. The value of the Fund was more than $500 million as of June 1993, Pet. App. 25, and has since grown to approximately $600 million.

Montana's coal severance tax has generated "enormous revenues," paid principally by out-of-state utility customers. *Cotton Petroleum*, 490 U.S. at 186 n.17 (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 641-42 (1981) (Blackmun, J., dissenting)). From 1975 through 1993, Montana received more than $1.1 billion in coal severance taxes. As of the end of 1993, the value of those revenues (with interest based on the rate of return earned by Montana's Constitutional Trust Fund) exceeded $3.8 billion.

Montana and Big Horn County also derive significant revenues from the Westmoreland mine from sources other than the illegal severance and gross proceeds taxes on Crow coal. These revenues include property, income and

resource indemnity taxes which were not challenged by the Tribe or the United States. Uncontroverted evidence showed that these other sources generated far more income for Montana and Big Horn County than those entities expended for services related or attributable to the Westmoreland mine. *Crow IV*, 92 F.3d at 829-30, Pet. App. 11.[8]

B. Proceedings Here and Below

1. *Crow I.* In 1978, the Tribe filed suit challenging the validity of the state severance and gross proceeds taxes on Crow coal on the ground that they were preempted by federal law. Pet. App. 19; J.A. 90. A year later, the district court dismissed the complaint for failure to state a claim. Pet. App. 197, 469 F. Supp. 154. On appeal, the court of appeals reversed and remanded. *Crow I*, 650 F.2d 1104, 665 F.2d 1390, Pet. App. 167, 169. The court of appeals held that the Tribe had alleged facts which, if proved, would establish that the challenged state taxes were preempted by the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq.*, and infringed on the Tribe's right to govern itself. 650 F.2d at 1113-17, Pet. App. 185-96. This Court denied certiorari. 459 U.S. 916 (1982).

In its *Crow I* opinion, the court of appeals applied the principles of preemption of state law in the Indian context as discussed in *White Mountain Apache Tribe v.*

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[8] The expert witness for the Tribe and the United States testified that from 1976 to 1986 Montana and Big Horn County received approximately $29 million in revenues from the Westmoreland mine from sources other than their invalid severance and gross proceeds taxes while the governmental costs associated with the mine during the same period were no more than $5 million. J.A. 297-98, 302a, 313-16, 320, 343.

Bracker, 448 U.S. 136 (1980). Those principles were summarized as follows:

> The [Supreme] Court found that Congress intended broad preemptive effect to be accorded federal statutes and regulations when the state action in question threatens the "firm federal policy of promoting tribal self-sufficiency and economic development". . . . No express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation or policy. On the other hand, legitimate interests of the state must be considered, and the ultimate result where the conduct of non-Indians on the reservation is involved depends on "a particularized inquiry into the nature of the State, Federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."

650 F.2d at 1109, Pet. App. 176-77, citations and footnote omitted, *quoting White Mountain*, 448 U.S. at 140 and 149.

The court of appeals concluded that the Indian Mineral Leasing Act of 1938 had three goals: achieving uniformity in the law governing mineral leases on Indian lands; granting tribal governments control over decisions relating to their minerals and over lease conditions; and encouraging tribal economic development. 650 F.2d at 1112-13, Pet. App. 183-85. Montana's severance tax would conflict with two of those purposes if the allegations of the complaint were established. "Most prominently, the magnitude of the tax will prevent the Tribe from receiving a large portion of the economic benefits of its coal." 650 F.2d at 1113, Pet. App. 185. In this regard, the court held that the severance tax statute on its face "made plain

[Montana's] intention to appropriate most of the economic rent." *Ibid*. *See*, discussion *supra* at 3 & 4-5. "While the state may have an interest in perpetuating the value of mineral wealth subject to its general civil jurisdiction, it has no such legitimate interest in appropriating Indian mineral wealth." 650 F.2d at 1114, Pet. App. 187. In addition, the severance tax "conflicts with the . . . Act's purpose of allowing tribes to control the development of their mineral resources." "[T]he [Tribe's] coal is not the State's to regulate, and assertion of such authority diminishes the Tribe's own power to regulate." 650 F.2d at 1114, Pet. App. 188.

2. *Crow II*. Following remand and the adoption and approval of the 1982 tax amendment to the Crow/Westmoreland lease, the Tribe and Westmoreland moved to deposit the disputed severance taxes into the district court's registry and the Tribe moved for a preliminary injunction to prevent Montana from enforcing its tax as long as that money was deposited with the court. Both motions were opposed by Montana. J.A. 161-200. Among other things Montana argued that: (i) the Tax Injunction Act, 28 U.S.C. § 1341, barred the district court from enjoining the state's tax, J.A. 165-69; (ii) the tax is paid by Westmoreland, not the Tribe, so the Tribe lacked any "monetary stake or litigious/interest," J.A. 171-72; (iii) the Tribe also lacked standing and has not proven any direct injury because it is not the taxpayer, J.A. 175-79; (iv) the State would be irreparably injured by the issuance of a preliminary injunction, J.A. 191-92, 199-200; and (v) "it is unnecessary to order the escrow of any funds paid by Westmoreland to the State because the State is fully capable of meeting any obligations which might ultimately arise as the result of any proper judgment,

order or decree issued by any court with proper jurisdiction and authority as the result of this litigation." J.A. 199. The district court rejected these arguments and granted the motions of the Tribe and Westmoreland. J.A. 211-15. The first payment of severance tax money into the escrow account was made in January 1983.

The United States intervened in June 1983 on behalf of the Tribe to protect the interests of the United States as trustee of the coal upon which Montana's taxes were levied. J.A. 2. Following a trial in January 1984,[9] the district court again ruled that Montana's taxes as applied to the Tribe's coal in the ceded strip were not preempted by federal law. 657 F.Supp. at 584, Pet. App. 110-66.[10] The district court recognized, however, the critical importance to the Tribe of obtaining additional revenues in order to achieve the federal objectives of an effective tribal government and a stronger economic base:

> [T]here are enormous unmet needs on the Crow Indian Reservation for additional revenues to

[9] After the trial but before the district court issued its decision, Westmoreland, the Tribe and the United States moved to allow Westmoreland's gross proceeds tax payments to be deposited into the court's registry and the Tribe and the United States sought a preliminary injunction against enforcement of that tax. Those motions were opposed by the petitioners and were denied by the district court. Pet. App. 225-64. Among other things, the district court held, as argued by the petitioners, Pet. App. 258, that there was no need for the funds to be held in escrow because "Mont. Code Ann. 2-9-316 (1983) sets forth an orderly procedure for political subdivisions of the state to satisfy any lawful final judgment." J.A. 263.

[10] The district court declined to declare the rights of the parties regarding the coal within the surface boundaries of the Crow Reservation. 657 F.Supp. at 589, Pet. App. 150-51.

> fund essential governmental programs and services in the areas of housing, health, employment, land acquisition, law enforcement, welfare and education. . . . Revenues gained from the development of tribally-owned coal reserves through taxation, royalty collection, or by any other legally-sanctioned means, could significantly assist the Tribe in developing a more effective tribal government and a stronger economic base.

657 F.Supp. at 584, Pet. App. 136.[11]

The court of appeals reversed, 819 F.2d 895, Pet. App. 88-109, finding, *inter alia*, that: (i) Montana's coal taxes "forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties for the Tribe," 819 F.2d at 899, Pet. App. 97; (ii) Montana's coal taxes reduced tribal revenues by impairing the marketability of the Tribe's coal, 819 F.2d at 903, Pet. App. 109; (iii) "tax revenue from coal production could generate funds for tribal services and provide employment for tribal members. . . . By taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress's overriding objective of encouraging tribal self-government and economic development," 819 F.2d at

[11] The expert economist for the Tribe and the United States presented undisputed testimony during the 1994 trial that: (i) the unemployment rate among Crow Indians was 44% compared to 3.3% among non-Indians in Big Horn County and 6% among all non-Indians in Montana; (ii) per capita income of Crow Indians was $4,243 compared to $10,717 for non-Indians in Big Horn County; and (iii) 50% of Crow Indians live under the poverty level as compared to 13% of the non-Indians in Big Horn County. 1 Tr. 136-39 (April 18, 1994).

902-903, Pet. App. 107; and (iv) "Montana's coal taxes . . . interfere with tribal economic development and autonomy," 819 F.2d at 903, Pet. App. 108.

The court of appeals further found that Montana's coal taxes were not narrowly tailored to support legitimate state interests. 819 F.2d at 900-01, Pet. App. 100-03. Accordingly, the challenged taxes were inconsistent with the purposes of, and therefore were preempted by, the Indian Mineral Leasing Act and also unlawfully infringed on the Tribe's sovereignty. 819 F.2d at 902-903, Pet. App. 105-07.

The court of appeals held that the Tribe's coal resources beneath the ceded strip "are a component of the reservation land itself." This conclusion was based on the Act of May 19, 1958, 72 Stat. 121, quoted *supra* at 3 n.3. 819 F.2d at 898, Pet. App. 95. Since the State's taxes were invalid as to the Tribe's coal in the ceded strip, it necessarily followed that they also were unlawful as applied to the coal within the Reservation boundaries. 819 F.2d at 903, Pet. App. 108. This Court summarily affirmed the court of appeals' judgment. 484 U.S. 997 (1988), Pet. App. 87.

Back in the district court following remand, attention initially focused on the escrowed funds. First, Westmoreland's utility customers, who paid the taxes pursuant to their coal purchase agreements with Westmoreland, sought to intervene, claiming that they were entitled to that money. Westmoreland also moved to join the utilities as additional parties. Both motions were denied. Pet. App. 265. Then Westmoreland moved to amend its previous position and to assert a claim to the escrowed funds. The district court granted Westmoreland's motion to amend its answer but denied its requested relief. It found "that the Crow Tribe of Indians, not Westmoreland,

is entitled to the funds held in the Court" because, among other things "[a]t all relevant times, the Crow Tribe has had a valid coal mining tax applicable to the mining by Westmoreland of its coal even though Westmoreland's mining activities were conducted on the ceded strip." Pet. App. 286. Neither Montana nor Big Horn County made any claim to the escrowed funds or took any position regarding their disposition.

Shortly thereafter, the district court issued a final judgment awarding the escrowed funds (approximately $29 million) to the United States in trust for the Tribe. Pet. App. 288, 292. This judgment was not appealed.

3. *Cotton Petroleum.* Fifteen months after its summary affirmance of *Crow II*, this Court upheld the validity of New Mexico's severance taxes as applied to tribally owned oil and gas produced by a tribal lessee in *Cotton Petroleum*. In its *Cotton* opinion, this Court distinguished New Mexico's taxes from those at issue in *Crow II*. Montana's "unique" severance and gross proceeds taxes, unlike New Mexico's, were "extraordinarily high" and "imposed a substantial burden on the Tribe." They also "had a negative effect on the marketability of coal produced in Montana." 490 U.S. at 186 & n.17. Accordingly, there was no need for this Court to reexamine its summary affirmance of *Crow II*. *Ibid.*

4. *Crow III.* *Crow III* concerned the claim of the United States and the Tribe to the severance and gross proceeds taxes illegally collected on Crow coal before Westmoreland began paying the disputed money into the district court's escrow account.[12] The district court

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[12] This money was not at issue when *Crow I* was briefed and decided. Consequently, that court's observation (650 F.2d 1113 n.13, Pet. App. 186 (emphasis added)) that the Tribe "is

denied the motion of Montana and Big Horn County to dismiss those claims. Pet. App. 67-86. Citing the Montana Supreme Court's decision in *Valley County v. Thomas*, 97 P.2d 345 (1939), as well as cases from other jurisdictions, cited *infra* at 45 n.31, the district court held that "an action for restitution may be maintained by one governmental entity against another even though the plaintiff is not the source of the funds." Pet. App. 80.

The court of appeals initially accepted an interlocutory appeal to determine whether the United States and the Tribe could state a claim to funds illegally collected from the Tribe's lessee. *Crow III*, 969 F.2d at 848, Pet. App. 59. Following full briefing and oral argument, however, the appeal was dismissed as improvidently granted because that issue essentially had been decided in *Crow II*. *Ibid*.

4. *Crow IV*. After the decision in *Crow III* and another trial, the district court issued its decision in the current phase of this case in November 1994. It determined that "it is a question of fact . . . whether a remedy in restitution arises at all in this case." Pet. App. 46-47. The district court recognized that Montana's illegal coal taxes had significant adverse impacts on the Tribe and contravened Congress' overriding objective of encouraging self-government and economic development. Pet. App. 27-29, 45 and 50. In its view, however, these factors favoring the Tribe were outweighed by others. Pet. App. 31-37, 45-54. Finding that it would not be unjust for Montana and Big Horn County to retain the taxes they illegally imposed and collected on Crow coal, the district

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apparently not entitled to any refund if the tax statutes are declared invalid," was rightly accorded no weight in its subsequent decisions. *See* Pet. App. 77-79.

court ruled that the Tribe and the United States were not entitled to any recovery. Pet. App. 52, 54.

In its conclusion of law, the district court reiterated its previous ruling that the Tribe and the United States were not automatically barred from recovering taxes paid by the Tribe's lessee. Nevertheless, it found that "the lack of privity" between the Tribe and Montana "has its place in determining restitution damages." Pet. App. 48-50.

The court of appeals reversed, stating that the district court:

> [F]ailed to give appropriate weight to the law of this case as established in the three prior appeals. In the process of weighing the equities in favor of and against restitution, the district court in effect reconsidered questions of law already decided by this Court in the prior appeals. Nearly every factor relied upon by the district court to determine that the Tribe was not entitled to relief is either contradicted or made irrelevant by our earlier holdings.

Crow IV, 92 F.3d at 828, Pet. App. 8.

The court of appeals held that the disgorgement remedy in favor of the Tribe was appropriate. It stressed the Tribe's need to raise revenues in order to fulfill the congressional objectives of tribal economic development and self-sufficiency:

> The [district] court improperly minimized the weight to be given the Tribe's interest in raising revenue from its mineral resources. We had stated in *Crow II* that "[c]oal production is vital to the economic development of the Crow Tribe [and] generate[s] funds for essential tribal service[s]," 819 F.2d at 901 [, Pet. App. 103], and noted that the Tribe's interest in coal tax revenue was particularly significant in view of the

> federal interest in Tribal economic development and self-sufficiency. *Id.* at 898 [Pet. App. 95].

92 F.3d at 829, Pet. App. 10.

The court of appeals further concluded that the district court had erred and ignored the law of the case by relying on the identity of the taxpayer. *Crow IV*, 92 F.3d at 828-29, Pet. App. at 8-9. It found that Westmoreland had agreed to pay the tribal tax in the 1982 amendment to the coal lease and that Westmoreland "was willing to pay coal taxes to the Tribe as early as 1976." Consequently, "there was no reason for the [district] court to distinguish between the taxes collected before and after 1982." *Crow IV*, 92 F.3d at 830, Pet. App. 11-12. The court of appeals also rejected Montana's reliance on *United States v. California*, 507 U.S. 746 (1993), because *California* "involved an entirely different factual situation." *Crow IV*, 92 F.3d at 828-29 n.2, Pet. App. 8-9; 93 F.3d at 194-95, Pet. App. 16.

The case was remanded to the district court "for entry of an order directing the State and County to disgorge the improperly collected taxes." *Crow IV*, 92 F.3d at 830, Pet. App. 12.

SUMMARY OF ARGUMENT

The Tribe and the United States unquestionably have causes of action to enforce the Tribe's federally secured rights and sovereign powers by claiming that Montana's taxes on the Tribe's coal resources are preempted by applicable federal law. The sole question presented in the petition for certiorari is whether the relief ordered by the court below to remedy the violation of the Tribe's rights is precluded because the illegal taxes were paid by the Tribe's lessee, not by the Tribe. The answer to that question is found in the rules governing the fashioning of appropriate relief to remedy invasions of federally

secured rights, not in the arguments of the petitioners and their amici directed to the analytically distinct issue of whether the Tribe and the United States have a separate and independent cause of action for recovery of the illegally collected taxes.

The petitioners' reliance on *United States v. California*, 507 U.S. 746 (1993), is misplaced primarily because the issue there was whether the United States, as a subrogee of the taxpayer, had a federal cause of action to recover taxes paid by its contractor and challenged under state law. *California* had nothing to do with the fashioning of appropriate relief for the violation of federally secured rights.

The outcome of the instant appeal is controlled not by *California* but by the principle, which dates back to "the earliest days of the Republic," that "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66, 69 (1992). The disgorgement remedy in favor of the Tribe ordered by the court below is appropriate primarily because: (i) it corrects the wrongs done to the Tribe during the period the petitioners collected their illegal coal taxes from Westmoreland; (ii) it effectuates the purposes of the federal laws violated by the petitioners; and (iii) it promotes compliance with and deters violations of those laws by others. In addition, the disgorgement remedy is supported by the rule that judicial decisions must be given full retroactive effect and by the fundamental and unquestioned principle of equity that no one shall be permitted to take advantage of his own wrong.

The fact that the illegal taxes were paid by Westmoreland is not relevant because the Tribe is the intended beneficiary of the laws that were broken and the party that was directly injured by the petitioners' illegal acts. The

federally secured rights and powers of the Tribe were violated, not those of Westmoreland. In *California*, by contrast, the government's cause of action was predicated solely on its voluntary indemnification agreement with its contractor.

None of the other arguments advanced by the petitioners makes the disgorgement remedy in favor of the Tribe inappropriate. The Tax Injunction Act is not applicable to suits challenging the validity of state taxes brought by the United States or Indian tribes. Remedies for the violation of federally secured rights are not limited by the requirements of common law causes of action. Even if they were so limited, the elements of the common law cause of action of assumpsit for money had and received clearly are satisfied in the circumstances presented here.

ARGUMENT

I. THIS CASE INVOLVES RELIEF FOR A FEDERAL CAUSE OF ACTION PREVIOUSLY HELD TO EXIST, WHILE THE ISSUE IN *CALIFORNIA* WAS WHETHER THERE WAS A FEDERAL CAUSE OF ACTION.

The arguments of petitioners and their supporting amici are marked by failure to distinguish between two analytically distinct issues, whether a litigant has a cause of action and what relief a litigant with a cause of action may be entitled to receive. *See Davis v. Passman*, 442 U.S. 228, 239 (1979), *quoted and followed in Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992).[13] Like the

[13] In a helpful footnote in *Davis*, this Court explained the issues of jurisdiction, standing, cause of action and relief:

> [J]*urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case . . . ; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction . . . ; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a Federal Court may make available.

442 U.S. at 239 n.18. *See* 28 U.S.C. § 2202 (federal courts may grant further relief after issuing a declaratory judgment).

instant case, *Franklin* turned on the difference between the existence of a cause of action and determining the appropriate remedy once a violation was found. A student brought suit under Title IX of the Education Amendments of 1972 seeking damages against a federally funded public high school on account of sexual harassment. Holding that damages were an appropriate remedy, this Court reaffirmed that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." 503 U.S. at 66-67. *See also, id.* at 69 ("the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive").[14] This Court then reaffirmed the

[14] The government's position in *Franklin* was rejected because it "mirrored the very misunderstanding over the difference between a cause of action and the relief afforded under it that sparked the confusion we attempted to clarify in *Davis*." 503 U.S. at 69.

The Tribe acknowledges that it was not always properly mindful of the distinction between a cause of action and the relief granted under it during the 20 year odyssey of this case and that it may have contributed to some of the confusion. At all relevant times, however, the petitioners clearly knew that the

long line of cases holding that "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Ibid.*

There is no doubt that the Tribe and the United States have a cause of action to enforce the Tribe's federally secured rights and sovereign powers by claiming that Montana's coal taxes on the Tribe's mineral resources are preempted by applicable federal law. In *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-74 & n.13 (1976), this Court reviewed its decisions in *Heckman v. United States*, 224 U.S. 413 (1926), and *United States v. Rickert*, 188 U.S. 432 (1903), and concluded that both the United States and the tribes had the requisite interest to secure the Indians' immunity from state taxation which conflicts with the measures the federal government adopted for their protection.[15] More recently, this Court ruled on challenges by Indian tribes to state taxation and to state license fees without questioning the existence of causes of action. *E.g., Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S.

Tribe and the United States were seeking recovery of the illegal taxes collected by the State and County and they were never misled in any material way. *See* F.R. Civ. P. 54(c) quoted *infra* at 24 n.18.

[15] Similarly, *United States v. Minnesota*, 270 U.S. 181, 193-95 (1926), upheld the right of the United States to invoke this Court's original jurisdiction on behalf of Chippewa Indians against a state to cancel patents the government had issued to the state. The interest of the government was found to "arise out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations; and in both aspects the interest is one which is vested in it as a sovereign." *Id.* at 194.

324 (1983); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *See also, National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-53 (1985) (recognizing a federal common law cause of action by non-Indian property owners challenging the civil jurisdiction of a tribal court and analogizing that claim to actions brought by Indian tribes to determine the extent of their immunity from state taxation). Moreover, the existence of causes of action by the Tribe and the United States to determine that federal law preempts Montana's coal taxes from being applied to Crow coal is conclusively established between the litigants by the decisions in *Crow I* and *Crow II* and the resulting final judgment issued by the district court in 1988, J.A. 292, which was not appealed. *See also* Pet. App. 75 (the instant proceeding is an extension of the previously established equity jurisdiction over causes of action brought by the Tribe and the United States).

Petitioners principally rely on *United States v. California*, 507 U.S. 746 (1993). The issue there, however, was whether the United States had a *federal cause of action* to recover taxes paid by someone else and challenged *under state law*.[16] *California* did not address the question of *relief* presented here, that is, whether the Tribe and the United

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[16] *See* 507 U.S. at 750 (Government's claim was "posited upon the interpretation of a state-created exemption from a state-created sales tax"); *Id.* at 754. ("[w]e conclude . . . that the Government cannot use the existence of an obligation to indemnify [its contractor] to create a *federal cause of action* for money had and received to recover state taxes paid by [its contractor] . . . ; *Id.* at 759-60 ("[t]oday we hold that shouldering the 'entire economic burden of the levy' . . . through indemnification does not give the Federal Government a *federal common law cause of action* for money had and received to challenge a state tax *on state-law grounds* simply because it is the Government"). (Emphasis added).

States, who indisputably have a cause of action to challenge state taxes on the grounds that they are preempted *by federal law*, are entitled to a remedy in the form of recovery of those taxes where they were found to violate *their* federally secured rights and powers, *not those of the taxpayer*.[17] The relief issue therefore is governed not by *California* but by *Franklin* in which this Court reaffirmed the longstanding principle that where federally secured rights are invaded, federal courts will grant the relief necessary to effectuate the congressional purpose and to make good the wrong done.[18]

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[17] In *California*, unlike the instant case, the United States sued as a subrogee of the taxpayer and thus stood in its shoes. This point is discussed further *infra* at 31-32 and 45-46.

[18] Perhaps mindful of this fatal flaw in their principal argument, petitioners attempt to transform and trivialize the issue presented to this Court to a question of whether the disgorgement remedy was properly pleaded. *See* Pet. Br. 14, 25. This effort is equally unavailing for several reasons including: (i) the pleading issue is neither presented in the petition nor fairly including therein, *see infra* at 39-40; (ii) there is no requirement that plaintiffs specifically plead the form of relief they will seek, F.R.Civ.P. 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings"); and *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1979); and (iii) petitioners clearly had notice of both the nature of the relief sought by the Tribe and the United States and the legal basis for that relief, Pet. App. 253, 259 (Tribe's Fourth Amended Complaint sought restitution and equitable relief for all severance and gross proceeds taxes paid on the production of Crow coal); *Id.* at 74-76 (1990 district court ruling that current phase of this case was an extension of its previously invoked equity jurisdiction and that once violations of significant tribal interests were established, district court had "broad equitable powers" to construct a remedy "that refers to state law but is not defeated by it"); and J.A. 335, 338 (Final Pre-

The Tribe and the United States properly invoked the jurisdiction of the federal courts to determine the extent of the Tribe's immunity from Montana's coal taxes.[19] There are no legitimate issues regarding the existence of their causes of action. The sole question raised in the petition for certiorari is one of *relief*, whether the State and County may be required to pay the money to the United States in trust for the Tribe that they illegally collected from Westmoreland. The proper analytic framework for deciding this issue is stated in *Franklin*: "[I]f a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." 503 U.S. at 69.

II. THE DISGORGEMENT REMEDY IN FAVOR OF THE CROW TRIBE IS APPROPRIATE.

Montana and Big Horn County violated the rights and interfered with the sovereignty of the Tribe and thwarted Congress's overriding objectives of encouraging tribal self-government and economic development by illegally collecting more than $58 million in taxes on coal

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Trial Order stating positions of Tribe and United States that the petitioners' "violations of federal law give rise to whatever remedies are necessary and appropriate to redress those wrongs, to fulfill the Indian Mineral Leasing act and the Tribe's sovereign rights, to restore the Tribe to the position it would have occupied if the violations had not occurred and to deprive the wrongdoers of any gains from their illegal acts" and that "the causes of action of the Tribe and the United States based on restitution or unjust enrichment are federal claims which may borrow from state law," *citing, inter alia, Franklin*).

[19] The Eleventh Amendment has not been raised before this Court and is not an issue because the United States brought suit on the Tribe's behalf. *Arizona v. California*, 460 U.S. 605, 614 (1983); Pet. App. 42, 72-73.

owned by the United States in trust for the Tribe. *Crow II*; *Cotton Petroleum*. The findings below conclusively establish that: (i) Montana and Big Horn County violated *the Tribe's* federally secured rights and powers, not Westmoreland's, and severely injured the Tribe; (ii) Montana's coal taxes were intentionally and illegitimately levied to appropriate most of the value of the Tribe's mineral wealth; and (iii) Montana and Big Horn County took money that otherwise would have gone towards supporting the Tribe and its programs. *See supra* at 2, 4-5, 10-11, 13-14, 15 and 17-18. The disgorgement remedy in favor of the Tribe ordered by the court of appeals is appropriate primarily because it corrects these wrongs done to the Tribe by effectuating the purposes of the laws that were broken and promotes compliance with, and deters violations of, those laws.

A. The Cardinal Principles Governing Appropriate Relief to Remedy Invasions of Federally Secured Rights Are to Correct the Wrongs Done to the Victim, to Effectuate the Purposes of the Laws Violated by the Wrongdoers, and to Promote Compliance with and Deter Violations of those Laws by Others.

The primary consideration in fashioning appropriate relief to remedy violations of federal law is to make good the wrongs done by effectuating the purposes of the laws that were violated. *Franklin*, 503 U.S. at 66; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 385, 386 (1970) (remedies for violation of the Securities Exchange Act of 1934 "are not to be limited to prospective relief" and should "effectuate the congressional policy by resolving doubts in favor of those the statute is designed to protect"); *J.I. Case v. Borak*, 377 U.S. 426, 433 (1964) ("it is the

duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose"); *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 and 296 (1960) (although district courts enjoyed "historic power of equity" to award lost wages to victims of unlawful discrimination, "the statutory purposes leave little room for the exercise of discretion not to order reimbursement"); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done"); and *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944) (the discretion of federal courts in remedying violations of federal law "must be exercised in light of the large objectives of the Act").

Albemarle illustrates application of this overriding principle. A seniority system was found to discriminate against present and former black employees at a paper mill in violation of their civil rights under federal law. The district court refused to award backpay to the plaintiff class for losses suffered under the illegal seniority program for two reasons, lack of bad faith by the employer and substantial prejudice to the employer resulting from plaintiffs' failure to seek backpay until nearly five years after the action was brought.

This Court reversed, holding that the power of the district court must be exercised "in light of the large objectives of the Act." 422 U.S. at 416. This Court stated:

> It is true that "[e]quity eschews mechanical rules . . . [and] depends on flexibility. . . . But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those

> purposes and not "equity [which] varies like the Chancellor's foot." Important national goals would be frustrated by a regime of discrimination that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." . . . The District Court's decision must therefore be measured against the purposes which inform [the federal law violated by the defendants].

422 U.S. at 417 [bracketed material in original, citations omitted]. This Court then held that the absence of bad faith was not a sufficient reason for denying backpay.

The backpay remedy in *Albemarle* also was found appropriate because it would promote compliance with, and deter violations of, the federal law that was violated. The primary objective of the law at issue was prophylactic, "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 422 U.S. at 417. This Court stated:

> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

422 U.S. at 417-18, citation omitted. *See also, United States v. City of Spokane*, 918 F.2d 84, 89 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) ("retroactive operation of our decision [invalidating taxes on a federal instrumentality] will surely foster a proper respect for that principle by

encouraging local entities to tread carefully when they impose taxes on entities like the Red Cross").

In *Franklin*, this Court applied these principles and held that damages are an appropriate remedy to correct violations of sex discrimination under a federal statute. This Court rejected the argument that the permissible remedies should be limited to backpay and prospective relief on the ground that those remedies would not do anything to correct the wrong done to the particular plaintiff. 503 U.S. at 71.

Denying an otherwise appropriate remedy for the invasion of federally secured rights may be justified only if based on an estoppel or on the plaintiff's closely related illegal conduct. *Albemarle*, 422 U.S. at 422-25; Dan B. Dobbs, I *Law of Remedies*, § 2.4(7) at 119 (1993). Here there are no allegations or suggestions of either.

B. The Disgorgement Remedy in Favor of the Tribe Corrects the Wrongs Done to the Tribe, Effectuates the Purposes of the Law Violated by the State and County and Promotes Compliance with and Deters Violations of those Laws.

Under *Franklin*, *Albemarle* and the other decisions of this Court cited above as well as those cited and followed in *Franklin*, whether the disgorgement remedy in favor of the Tribe is appropriate here is governed primarily by the answers to the following related questions: (i) will the remedy correct the wrong done to the Tribe?; (ii) will the remedy effectuate the purposes of the laws violated by the State and County?; and (iii) will the remedy promote compliance with, and deter violations of, the laws that were broken?

Montana's "unique," "extraordinarily high" and illegal coal taxes "imposed a substantial burden on the

Tribe." They "had a negative effect on the marketability of coal produced in Montana," "illegitimately" appropriated 80% of the economic rent attributable to the Tribe's coal and took "revenue that would otherwise go towards supporting the Tribe and its programs." It is therefore conclusively established that the imposition of the state's taxes on the Tribe's coal interfered with Congress's overriding objectives of encouraging tribal self-government and economic development. *Cotton Petroleum*, 490 U.S. at 186 & n.17; *Crow IV*, 92 F.3d at 830, Pet. App. 12; *Crow II*, 819 F.2d at 902-03, Pet. App. 107-08.[20]

If petitioners' position were upheld, the Tribe would be left without any remedy for the wrongs inflicted by Montana and Big Horn County before the court orders providing for the taxes on the Tribe's coal to be paid into the district court's registry. The disgorgement remedy ordered by the court below compensates the Tribe for those injuries. It also effectuates the congressional purposes of the federal laws by encouraging tribal self-government and economic development, just as the award of the escrowed funds in 1988 fulfilled those purposes during the periods the challenged taxes were paid into the district court's registry.

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[20] *See e.g., California v. Cabazon Band*, 480 U.S. 202, 219 (1987) ("self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development' "); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 and n.10 (1980) (describing "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development").

Moreover, if states and their political subdivisions knew that they would be able to keep tax revenues obtained in violation of tribal rights, "they would have little incentive to shun practices of dubious legality." *Albemarle*, 422 U.S. at 417. They would be encouraged to impose taxes of questionable validity on Indian commerce and quickly collect as much money as possible, secure in the knowledge that there would not be a retroactive remedy even if the taxes eventually are found illegal. The possibility of a disgorgement remedy when state taxes arguably infringe on the federally secured rights and powers of Indian tribes would serve as a healthy deterrent and an incentive for state and local officials to tread carefully and cautiously in this sensitive area. Paraphrasing *Albemarle*, it is the prospect of being held liable for their ill-gotten gains that provides the spur that would cause states and their political subdivisions to try to eliminate their activities which infringe on tribal sovereignty and interfere with Congress's overriding objectives of encouraging tribal self-government and economic development. *Id.* at 417-18.

C. The Crow Tribe, not Westmoreland, Is the Intended Beneficiary of the Federal Laws that were Broken and the Party Injured by Their Violation.

The fact that Montana's illegal taxes were collected from Westmoreland makes no difference. Unlike *California*, where the cause of action of the United States was based solely on its status as a subrogee of its contractor under a voluntary indemnification agreement,[21] here the

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[21] *California* involved a typical claim under state law by a taxpayer that certain property should not have been taxed.

Tribe's action and standing are predicated on the violations of its federally secured rights. The Tribe and the United States are not claiming by, through or under Westmoreland. The Tribe, not the taxpayer, is the intended beneficiary of the federal laws that were broken.

The Tribe is the real party in interest which suffered legal injury from the violation of federal laws. The state's coal taxes collected from Westmoreland were held invalid because they appropriated *the Tribe's* mineral wealth and because they left little or no room for *the Tribe* to regulate the development of, and to optimize its revenues from, its coal. Congress did not intend to create tax havens or windfalls for companies mining tribal minerals or to make them subject to lower tax burdens than their competitors. Tribal lessees like Westmoreland simply are the vehicles through which the federal policies of promoting tribal economic development and self-government are achieved.

Moreover, unlike the situation in *California*, the interests of the Tribe and Westmoreland are partially antagonistic. Westmoreland knew that it would have to pay coal taxes either to the State or to the Tribe. Its objective was to avoid having to pay taxes to both jurisdictions. The Tribe, on the other hand, was seeking to maximize its revenues as well as its control over the development and marketing of its minerals. The Tribe also was concerned about a double burden of taxation being imposed on its lessee, for fear that Westmoreland would have to close its mine. *See supra* at 7.

Under the state tax statute, the claimed exemption was a matter entirely between the state and the taxpayer.

Vesting the exclusive right to recover illegally collected state and local taxes in the tribes' mineral lessees would undermine the purposes of the laws that were violated. As shown by the instant case, mineral lessees might find it in their interest not to challenge the validity of state taxes and/or to negotiate agreements waiving their claims to the taxes paid to the states. States would have an incentive to do everything within their power to obtain these kinds of arrangements. The economic interest of the tribal lessees then would be to do everything they could to prevent tribes from imposing their own taxes, *e.g.*, by threatening to close the mine or to delay mining until the state/tribal taxation issues were clarified, or by persuading the Interior Department not to approve the tribal tax because it would not be in a tribe's best interest or because a tribe lacked the power under its Constitutions or under federal law, or for some other reason. In short, there would be a tendency for the tribes' lessees to become the tribes' adversaries. Simply the existence of these factors and complications would be a major deterrent to mining companies even contemplating a mining lease with an Indian tribe, no less making a major investment to extract tribal minerals.

The denial of the disgorgement remedy therefore not only would deprive the Tribe of any remedy for the wrongs inflicted by petitioners during the periods they illegally collected taxes from Westmoreland, it would also undermine the salutary objectives of federal law and create major impediments to a healthy and constructive relationship between tribes and their mineral lessees. An outcome more at odds with the objectives of the laws that were broken or with the overriding purposes of federal Indian law scarcely can be imagined.

D. Other Considerations Support the Disgorgement Remedy.

1. Judicial Decisions Should Be Given Full Retroactive Effect.

Consideration of an appropriate remedy often becomes entangled with whether a decision should be given retroactive effect. *See Mills*, 396 U.S. at 386; *J.I. Case*, 377 U.S. at 434; and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 (1990). In *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), which also involved the recovery of illegal state taxes, this Court overruled the test for prospective application of judicial decisions applied in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and "prohibited the erection of selective temporal barriers to the application of federal law in noncriminal cases." 509 U.S. at 97. Federal courts lack power to make rules of law retroactive or prospective as they see fit. 509 U.S. at 95 & n.9 and 96. Rather,

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97. *See also, Rivers v. Roadway Express*, 511 U.S. 298, 312 (1994). Under *Harper*, the holding of *Crow II* should be applied to all preceding events including the collection of the illegal taxes prior to the establishment of the district court's escrow account.

The petitioners seek to erect precisely the sort of artificial temporal barrier that *Harper* expressly prohibits. In the final analysis, the petitioners' position depends on one factor – whether and when the illegal taxes were paid into the district court's registry. If so, they would be

turned over to the United States in trust for the Tribe; if not, Montana and Big Horn County would get to keep tens of millions of dollars they collected illegally at the Tribe's expense.[22] *Harper's* full retroactivity rule does not allow the ultimate outcome of a case to turn on such time-related, fortuitous events or on interlocutory decisions based on the probability of ultimate success on the merits prior to development of a factual record and appellate review. *See Crow IV*, 92 F.3d at 830, Pet. App. 12 ("there was no reason for the [district] court to distinguish between the taxes collected before and after 1982").

2. The Principles of Finality and Repose Should be Respected.

The *Crow II* decision and its aftermath resulting in the 1988 unappealed final judgment awarding the escrowed money to the United States in trust for the Tribe establish the appropriateness of the Tribe receiving all severance and gross proceeds taxes paid by Westmoreland on its coal as the retroactive remedy for the violations of its rights and sovereignty. That determination "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Arizona v. California*, 460 U.S. at

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[22] There was no indication that the district court's decisions in 1983 and '84 whether to require the taxes to be paid into escrow later would become the controlling factor in determining the extent of appropriate final relief. To the contrary, in 1984 the district court saw no need to order Westmoreland's gross proceeds tax payments to be paid into escrow because it reasoned that the Tribe would have an adequate remedy under Mont. Code Ann. § 2-9-316 if that tax eventually was declared invalid. J.A. 260, 262-63; *supra* at 12 n.9.

619.[23] Those principles preclude according different treatment to the illegal taxes collected before and after the escrow accounts established by the district court.

3. Federal Interests Take Precedence Over a State's Interest In Retaining Taxes Collected in Violation of Federal Law.

In *McKesson*, this Court unanimously held that states are required to provide a meaningful opportunity for taxpayers to obtain refunds of taxes found unconstitutional under the Commerce Clause. Similarly, *Harper* reversed a state supreme court's decision denying federal retirees refunds of taxes held invalid under the constitutional doctrine of intergovernmental tax immunity. In both cases, this Court held that limiting relief for taxes collected in violation of federal law to prospective remedies is not sufficient to meet federal requirements.

McKesson involved an unconstitutional excise tax on alcoholic beverages. The Florida Supreme Court found that state authorities had collected the tax in good faith

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[23] *Arizona v. California* involved an attempt to reopen a final judgment issued by this Court in an action within its original jurisdiction pursuant to a provision in the decree retaining jurisdiction to modify the decree. The situation here with regard to proceedings in the same case following the issuance of an unappealed final judgment is similar. *See* 460 U.S. at 617 n.7. *See also, Nevada v. United States*, 463 U.S. 110 (1983) (United States and Indian tribe held barred from reopening an unappealed final water rights decree by res judicata); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (litigants held barred from relitigating an unappealed final judgment even though the judgment was based on a principle subsequently overruled by the Supreme Court and similar actions were successfully appealed).

reliance on a presumptively valid statute. It also suggested that granting a refund probably would result in a windfall because of the likelihood that the cost of the tax had been passed on to third parties. 496 U.S. at 26.

This Court observed that the State had various ways of coping with the fiscal consequences of potentially unconstitutional taxes which it chose not to utilize. For example, the challenged taxes could have been paid into an escrow account. Moreover, there was substantial reason to doubt the validity of the liquor taxes. *Id.* at 45 & n.29, 50. These factors are applicable here as well. *See Crow IV*, 92 F.3d at 829 & n.3, Pet. App. 9.[24]

This Court also rejected Florida's argument that it should be allowed to keep the unlawful taxes because the taxes probably had been passed on to the taxpayer's customers and therefore would constitute a windfall. Even if that were true, a retroactive remedy would be appropriate in order to effectuate the underlying purpose of the Interstate Commerce Clause. 496 U.S. at 48.

The only difference between *McKesson* and the instant case is that the plaintiffs in *McKesson* were taxpayers. But contrary to petitioners' primary contention, this Court also has held that non-taxpayers may recover taxes collected in contravention of federal law. *Maryland v. Louisiana*, 451 U.S. 725 (1981). In that case, several states challenged the

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[24] This Court's treatment of Florida's equitable defenses in *McKesson* also is supported by its reasoning in *Owen v. City of Independence*, 445 U.S. 622 (1980), that substantial equities cut in favor of persons injured as a result of the illegal actions of a governmental entity. "[W]here the . . . government itself . . . is responsible for the constitutional deprivation[,] it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual." 445 U.S. at 655 n.39.

constitutionality of taxes imposed by Louisiana on certain uses of natural gas brought into the State from the outer continental shelf. The states sued for declaratory and injunctive relief as well as for refunds of the taxes already collected. This Court held that the states could seek recovery of taxes they did not pay in order to protect their citizens from substantial economic injuries resulting from Louisiana's unconstitutional tax. *Id.* at 739. Like *Maryland*, the instant case involves recovery of state taxes collected in violation of federal law by an entity that is an intended beneficiary of the broken law.

Maryland negates the existence of the *per se* rule urged by petitioners that would preclude the recovery of illegal taxes by non-taxpayers. Neither petitioners nor any of the amici states suggest that *Maryland* was wrongly decided or that *California* implicitly overruled, limited or qualified *Maryland's* holding that non-taxpayers may recover unlawfully collected taxes that conflict with federal policies and interests.

4. Montana and Big Horn County Should Not Be Allowed To Take Advantage of Their Own Wrongs.

The disgorgement remedy in favor of the Tribe ordered by the court below also will fulfill the "ultimate, fundamental and unquestioned" principle of equity that "no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." *R. H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934); Mont. Code Ann. § 1-3-208 (codifying the principle that "no one can take advantage of his own wrong" as a "maxim of jurisprudence"); *Western Media, Inc. v. Merrick*, 232 Mont. 480, 757 P.2d 1308, 1312 (1988) (applying Mont. Code Ann. § 1-3-208).

This Court's decision in *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), applied this principle in a situation involving the fashioning of appropriate relief to remedy the violation of federal law. A former CIA agent wrote a book contrary to the covenant in his employment contract not to publish any material relating to the CIA without the agency's prior approval. This Court imposed a constructive trust on profits derived from sale of the book. Requiring the former agent "to disgorge the benefits of his faithlessness" served the dual purposes of preventing him from taking advantage of his wrong and of effectuating the federal policy that was violated. 444 U.S. at 514-16. The disgorgement remedy in favor of the Tribe fulfills these same purposes.

III. THERE ARE NO FACTORS THAT WOULD MAKE THE DISGORGEMENT REMEDY IN FAVOR OF THE TRIBE INAPPROPRIATE.

Only one question was presented in the petition for a writ of certiorari, whether taxes paid by one party, Westmoreland, may be recovered by another, the United States on the Tribe's behalf. Several extraneous issues are discussed in petitioners' brief, including such matters as the location of the Westmoreland mine within the ceded strip, the services provided by the State and County in the ceded strip, the Tax Injunction Act, the Secretary of the Interior's purported decision not to approve the Tribe's severance tax as applied to its ceded strip coal, the proper amount of any recovery, the balancing of equities, Montana's good or bad faith when its coal taxes were enacted, and claimed defects in pleadings. These issues were not raised in the petition nor are they fairly included within the question that was presented. Consequently, they "will not be considered by the Court." Sup. Ct. Rule 14.1(a); *Izumi Seimitsu Kogyu v. U.S. Phillips*, 510 U.S. 31 & n.5 (1993) ("a question

which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein' "; "the fact that the petitioner discussed this issue in the text of its petition for certiorari does not bring it before us"; "we will disregard Rule 14.1(a) and consider issues not raised in the petition 'only in the most exceptional cases' ").

A. This Case Is Not Affected By the Tax Injunction Act.

As previously noted (*supra* at 25), a federal court's remedial authority may be limited by Congress. Petitioners' reliance on the Tax Injunction Act, 28 U.S.C. § 1341, therefore could be considered in determining whether a remedy for the invasion of the Tribe's federally secured rights is appropriate if it was fairly included within the question presented in the petition. It was not.[25]

In any event, § 1341[26] was not argued below for good reason. In *Department of Employment v. United States*, 385

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[25] Section 1341 was not mentioned either in the question presented or in the entire petition. The statute is addressed to the jurisdiction of federal courts, not to whether a non-taxpayer may recover taxes paid by someone else.

Moreover, petitioners did not rely on or cite to § 1341 in either their Ninth Circuit brief or their petition for rehearing with suggestion for rehearing en banc to that Court. Accordingly, this argument should not now be considered by this Court. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, ___ n.7, 116 S.Ct. 1396, 1402 n.7 (1996); *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 456-57 (1995).

[26] Section 1341 states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

U.S. 355 (1966), this Court held, "in accord with an unbroken line of authority and convincing evidence of legislative purpose, that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Id.* at 358, footnotes omitted. This holding was extended to suits by Indian tribes challenging the validity of state taxes in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-75 (1976). Hence, § 1341 is "inapplicable" to the instant action. *Id.* at 470.[27]

B. Remedies for the Violation of Federally Secured Rights Are Not Limited by the Elements of Common Law Causes of Action.

Contrary to petitioners' underlying premise, the relief federal courts may grant to remedy violations of federal law is not limited to or constrained by traditional common law causes of action. In *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967), for example, this Court upheld the right of the United States to impose liability on shipowners under the Rivers and Harbors Act

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[27] Furthermore, § 1341 applies only "where a plain, speedy and efficient remedy may be had in the courts of such State." There is no such remedy here because the applicable state law, Mont. Code Ann. § 15-1-402, requires "[t]he person upon whom a property tax or fee is being imposed" to pay the tax or fee under protest "in order to receive a refund." Montana's coal taxes were not imposed on the Tribe, so the Tribe could not have paid them under protest and therefore could not have brought an action for their recovery under state law. There is no remedy, no less one that is "plain and efficient," under Montana law for persons or entities in the Tribe's position to recover taxes paid by someone else. *See also*, Mont. Code Ann. § 15-1-406 (authorizing declaratory judgment actions challenging the validity of state taxes by "an aggrieved taxpayer").

of 1895 for the negligent sinking of their vessels because that remedy was necessary to fulfill the statutory purpose. "Denial of such a remedy . . . would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim." 389 U.S. at 204. This Court specifically declined to decide whether the United States would have been entitled to that relief in the absence of the statute. 389 U.S. at 196 n.5.[28]

Petitioners have not cited a single case, and the Tribe is not aware of any, where an otherwise appropriate remedy for the violation of a federal law was withheld on the ground that the prerequisites for a common law cause of action were satisfied.[29] Indeed, absent an estoppel,

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[28] Here, equally extraordinarily, the wrongdoers are seeking to retain the profits obtained from their illegal acts by shifting attention to the stakeholder and away from the real victim.

[29] Petitioners cite four decisions of this Court to support their argument that the power of federal courts to grant appropriate relief to remedy violations of federal law is constrained by the elements of traditional common law causes of action, *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Heck v. Humphrey*, 512 U.S. 447 (1994); *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940); and *Lonchar v. Thomas*, 517 U.S. 314, 116 S.Ct. 1293 (1996), incorrectly cited by the petitioners as *"Lochner v. Thomas."* None of these cases remotely stands for that proposition.

Rondeau held no more than that a showing of irreparable harm was necessary for a private litigant to obtain injunctive relief for a violation of a federal securities statute. That common sense constraint on the use of a federal court's coercive powers is a far cry from a holding that those courts may not grant relief necessary to effectuate the purposes of the federal law unless all of the requirements of a traditional common law cause of action are satisfied. Indeed, this Court specifically noted that the

illegal conduct or a jurisdictional or procedural defense, this Court has never denied a remedy for the violation of a federally secured right which would correct the wrong done to the plaintiff and effectuate the purpose of the laws that were broken.

The instant case involves a cognizable cause of action brought pursuant to federal laws. Violations of these laws have been conclusively established. Consequently, the issue of appropriate relief is governed by the rules and criteria discussed in Part II *supra*, not on technical requirements of common law causes of action.

C. All of the Elements of the Assumpsit Common Law Cause of Action Are Satisfied.

Assuming *arguendo* that the common law action for assumpsit is relevant to fashioning an appropriate remedy, all of its requirements are satisfied. Assumpsit, an action for money had and received, requires: (i) a wrongful act; (ii) specific property acquired by the wrongdoer which is traceable to the wrongful behavior; and (iii) a reason why

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injunctive relief at issue in *Rondeau* was not needed to correct any of the evils the law at issue was intended to prevent. 422 U.S. at 58-59.

Petitioners' reliance on *Heck* and *Deckert* again reveals their confusion regarding the difference between a federal cause of action and the relief afforded under it.

The Tribe has no quarrel with the principle, recently restated in *Lonchar*, that "courts of equity must be governed by rules and precedents no less than the courts of law." 517 U.S. at ___, 116 S.Ct. at 1298, *citing, inter alia, Albemarle*. The relevant question is what body of rules and precedents applies to the fashioning of appropriate relief for the violation of federally secured rights, those discussed in Part II of this Brief and applied in *Albemarle* or the elements of common law causes of action as urged by petitioners.

reason why the party holding the property should not be allowed in good conscience to keep it. *Alsco-Harvard Fraud Litigation*, 523 F.Supp. 790, 806-07 (D.D.C. 1981) (and cases therein cited); *Schaeffer v. Miller*, 41 Mont. 417, 423, 109 P. 970, 973 (1910); Pet. App. 43, 70-71. If these elements are present, the law implies the existence of a contract to turn over the wrongfully acquired property to its rightful owner. *Midwest Aviation, Inc. v. General Electric Credit Corp.*, 907 F.2d 732, 736-37, 743-44 (7th Cir. 1990) ("[q]uasi-contractual duties arise only in situations of unjust enrichment, situations where 'one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which *ex cequo et bono* belongs to another' ").

All three elements clearly are satisfied here. The wrongful acts are the imposition and collection of the invalid state coal taxes in violation of federal law. The wrongfully acquired property is the $58 million in illegally collected coal tax revenues. The reasons why Montana should not be allowed to keep that money and why it should be paid over to the Tribe are that it was acquired in violation of the Tribe's rights under federal law and that disgorgement would effectuate the purpose of those laws and make good the wrongs done to the Tribe during the periods the illegal taxes were collected.[30]

Nothing more is required. In its 1990 decision denying Montana's motion for summary judgment, the district

[30] Petitioners' description of the assumpsit cause of action includes the additional element of a benefit conferred by the plaintiff to the defendant. Pet. Br. 26. Assuming *arguendo* that a benefit conferred by the plaintiff is required, it is satisfied here, albeit involuntarily, by the value of the Tribe's coal which Montana unlawfully appropriated to itself.

court carefully considered and squarely rejected Montana's argument that restitutionary relief is precluded because the taxes were paid to Montana and Big Horn County by Westmoreland, not by the Tribe. Relying on case law from Montana as well as other jurisdictions[31], the district court concluded that the claim of the Tribe and the United States to the illegally collected taxes turns on the issue of unjust enrichment, not on the identity of the taxpayer. Pet. App. 79-81. Here, as in *Snepp*, the nexus between the wrongdoers and their victims necessary to establish a cause of action or to obtain appropriate relief is the violation of the victim's federally secured rights. That was also the precise holding of *Crow III*.

California is not to the contrary. It does not hold or even suggest that only taxpayers may recover taxes illegally imposed and collected by governmental entities. This Court pointed out in *California* that the federal government's contractor had challenged the state's taxes, had had its day in court, settled its claim and gone home. 507 U.S. at 752. The federal government's claim was proprietary in nature[32] and was derived from its contractor. Both the government and its contractor were provided a

[31] *Valley County v. Thomas*, 109 Mont. 345, 97 P.2d 345 (1939); *Humboldt Co. v. Lander Co.*, 56 P. 228 (Nev. 1899); *City of Norfolk v. Norfolk County*, 91 S.E. 820, 822-24 (Va. 1917); and *Board of Highway Comm'rs v. Bloomington*, 97 N.E. 280, 283-85 (Ill. 1912). These cases as well as *Maryland v. Louisiana* stand for the proposition that non-taxpayers may, under some circumstances, sue to recover taxes. They have been on the books since the turn of the century, without opening the floodgates of litigation or undermining the tax systems of state and local governments.

[32] Unlike the instant case, *California* did not involve any sovereign interest of the United States. *See supra* at 22 & n.15. This Court noted in *California* that different rules apply to the United States when it is acting as a sovereign. 507 U.S. at 757-58.

full and fair opportunity to challenge the validity of California's taxes under state law. 507 U.S. at 750, 756-57. The failure of the federal government to comply with state filing requirements barred its claim for a tax refund under state law. 507 U.S. at 756-57. Since an adequate remedy was available which the federal government had failed to utilize, it was not unjust for California to keep the money it collected from the contractor, just as a state would be able to retain taxes received from any other taxpayer who failed to follow procedures required to obtain a refund. When the federal government "challenge[s] a state tax on state-law grounds," it should not be treated any differently than other taxpayers "simply because it is the Government." 507 U.S. at 759-60, emphasis added.

This case is entirely different. The Tribe's claim is predicated on the unlawful appropriation and conversion of its mineral wealth and the violation of its federally secured rights, not on state law or a voluntary indemnification agreement. The Tribe and the United States do not have a plain and efficient remedy for recovery of the taxes at issue under state law. *See supra* at 41 n.27. There is no contention that the Tribe's rights have lapsed or that its claim is barred. Nor is there an attempt to circumvent a stale state claim by substituting a federal cause of action. Granting the relief sought by the Tribe and the United States would not result in unfair treatment vis-a-vis other taxpayers. In short, none of the factors which made it equitable for California to keep the taxes it collected from the federal government's contractor is present here.

IV. THE RAMIFICATIONS OF THIS CASE ARE LIKELY TO BE LIMITED AND AN AWARD TO THE TRIBE MAY BE SATISFIED WITHOUT SEVERE DISRUPTION OR UNDUE HARDSHIP.

A. This Case is Unique in Many Respects.

Contrary to the concerns expressed by the petitioners and their amici, the circumstances presented in this case are not likely to recur. First, as this Court observed in *Cotton Petroleum*, Montana's "extraordinarily high" coal taxes are "unique." 490 U.S. at 186 n.17. Second, the United States and the Tribe are co-plaintiffs, so there are no Eleventh Amendment or sovereign immunity issues[33] and section 1341 is not applicable. *See supra* at 25 n.19 and 40-41. Third, owing to the presence of the United States in its sovereign capacity and as the Tribe's trustee and the plenary power of the federal government over Indian affairs,[34] the solicitude for state taxation systems and fiscal interests is not as strong here as it would be in other contexts. Fourth, the claimant to the taxes illegally collected by the State and County is a separate sovereign entity that is not subject to state jurisdiction or control

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[33] This Court held in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), that the Eleventh Amendment bars suits by Indian tribes against states without the states' consent. *Cf. Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) (suits by Indian tribes against states and state officials held barred by the Eleventh Amendment).

[34] *See Seminole Tribe*, 517 U.S. at ___, 116 S. Ct. at 1126 (states still exercise some authority over interstate trade but have been divested of virtually all authority over Indian Commerce and Indian tribes); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("Indian Commerce Clause makes Indian relations the exclusive province of federal law").

and is the intended beneficiary of federal laws designed to promote its self-government and economic development. Fifth, from the very beginning Montana had actual notice of the Tribe's position that the proposed coal taxes would be invalid as applied to tribal coal and, as in *McKesson*, 496 U.S. at 50, "the State here does not and cannot claim that the . . . invalidation of the [its taxes as applied to Crow coal] was a surprise." Sixth, the state has sufficient money in its Constitutional Trust Fund to satisfy the judgment of the court of appeals. Seventh, the disgorgement remedy in favor of the Tribe is the only relief that would correct the wrongs done to the beneficiary and effectuate the purposes of the federal laws that were broken during the periods the State and County collected the illegal taxes. This combination of circumstances is likely to be extremely rare if not unique.

B. States Have the Ability to Shape and Limit Remedies for Recovery of Illegally Collected Taxes.

If and to the extent that non-taxpayers other than the United States and states may be able to overcome the sovereign immunity of the taxing states in order to recover taxes collected in violation of federal law, states would have flexibility to determine an appropriate remedy that satisfies the minimum requirements of federal law. As noted in *McKesson*, 496 U.S. at 50, "in the future, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation. . . . " *See also, id.* at 36-41; *Harper*, 509 U.S. at 100-01. For example, non-taxpayers may be required to provide notice of their intent to recover taxes paid by someone else and their claims may be made

subject to statutes of limitations. 496 U.S. at 50. Consequently, the claims of the petitioners and their amici that the decision below will create havoc with the operation of their tax systems are greatly exaggerated, to say the least.

C. Montana's Constitutional Trust Fund Is Available to Satisfy an Award to the Tribe and Should Be Treated as the Functional Equivalent of an Escrow Account.

As previously noted (*supra* at 34-35), the district court's unarticulated bottom line was that the Tribe should not be allowed to recover any of the illegal taxes which were not paid into the court's registry. Although Montana did not formally establish a separate escrow account for the illegal taxes it collected from Westmoreland, its Constitutional Trust Fund (which had a book value of more than $500 million as of June 1993, Pet. App. 25; *supra* at 8) serves essentially the same purpose.

It is unseemly for Montana to seek to avoid restitutionary relief by invoking concern about the potential adverse consequences of a large judgment against which it was (and is) fully equipped to protect itself. *See McKesson*, 496 U.S. at 50 (the state "failed to take reasonable precautions to reduce its ultimate exposure for the unconstitutional tax").[35] Under these circumstances, the Constitutional Trust Fund should be viewed as an escrow account for the purpose of satisfying a judgment for the United States in trust for the Tribe under the venerable equitable principle that "equity regards as done that

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[35] The amount of money at issue in the instant case reflects the magnitude of the unjust enrichment unlawfully obtained by the State and County at the Tribe's expense and the extent of the injuries inflicted on the Tribe.

which ought to have been done." *Camp v. Boyd*, 229 U.S. 530, 559 (1912); *Littlefield v. Perry*, 88 U.S. (21 Wall.) 205, 226-27 (1875); Mont. Code Ann. § 1-3-220 (codifying as a maxim of jurisprudence: "that which ought to have been done is to be regarded as done. . . . "); *Matter of Adoption of S.T.V.*, 226 Mont. 18, 733 P.2d 841, 842 (1987) (applying Mont. Code Ann. § 1-3-220).

The existence of the Constitutional Trust Fund means that Montana would be able to make full restitution to the Tribe without severe disruption or undue hardship to its ongoing programs and operations. It also eliminates any conceivable basis for treating the taxes now at issue any differently than the escrowed funds previously awarded to the United States in trust for the Tribe.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MONTANA, ET AL., PETITIONERS

v.

CROW TRIBE OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioners were properly required to surrender to the Crow Tribe of Indians the proceeds of taxes unlawfully imposed on the Tribe's reservation coal in violation of the Tribe's federally guaranteed rights, where the taxes were paid by the company extracting the coal pursuant to a lease agreement with the Tribe.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1829

STATE OF MONTANA, ET AL., PETITIONERS

v.

CROW TRIBE OF INDIANS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 92 F.3d 826, amended, 98 F.3d 1194. The opinion of the district court (Pet. App. 17-57) is unreported.

Previous opinions in the case include (1) the initial opinion of the district court (Pet. App. 197-227), reported at 469 F. Supp. 154; (2) an opinion of the court of appeals reversing and remanding that decision (Pet. App. 167-196), reported at 650 F.2d 1104, amended, 665 F.2d 1390 (*Crow I*); (3) the opinion of the district court on remand (Pet. App. 110-166), reported at 657 F. Supp. 573; (4) an opinion of the court of appeals reversing that decision (Pet. App. 88-109), reported at 819 F.2d 895 (*Crow II*); (5) a memorandum order of this Court (Pet. App. 87) summarily affirming the judgment in *Crow II*, reported at 484 U.S. 997; (6) an unreported opinion of the district court on remand (Pet. App. 67-86), and an unreported order of certification for interlocutory appeal of that decision (Pet. App. 61-66); and (7) an

opinion of the court of appeals dismissing the interlocutory appeal (Pet. App. 58-60), reported at 969 F.2d 848 (*Crow III*).

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1996. Petitions for rehearing were denied on November 21, 1996 (Cross-Pet. App., No. 96-1894, at 1-2) and February 21, 1997 (Pet. App. 228-229). The petition for a writ of certiorari was filed on May 16, 1997, and was granted on October 14, 1997 (118 S. Ct. 294). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. For at least three hundred years, the Crow Tribe of Indians (the Tribe) has inhabited what is now the southern part of the State of Montana. Upon encountering these horse-riding people in the mid-18th century, the French called them "les beaux hommes." The Tribe was loyal to the United States through the wars with the Sioux during the 19th century. A territory of more than 30 million acres of land was recognized for the Tribe in the First Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749. The Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, formally established a Crow Reservation of approximately 8 million acres, "set apart for the absolute and undisturbed use and occupation" of the Tribe. *Id.* at Art. II. Subsequent Acts of Congress, however, gradually reduced the size of the Reservation as portions were opened to settlement by non-Indians. The current Reservation measures approximately 2.3 million acres. See *Montana* v. *United States*, 450 U.S. 544, 547-548 (1981); Department of Commerce, Economic Development Administration, *American Indian Reservations and Trust Areas* 400 (1996); see also R. Lowie, *Myths and Traditions of the Crow Indians* ix (1993).[1]

a. This case concerns taxes imposed on the extraction and sale of coal held in trust by the United States as part of the Crow Tribe's reservation mineral estate under a tract of land called the "ceded strip." That tract was originally ceded to the United States as part of an agreement under which the Tribe surrendered about 1,137,500 acres of land so that they could be opened to settlement by non-Indians. Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352; see *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 163-165 (1920) (discussing 1904 Act and ceded strip); Pet. App. 18-19. The 1904 Act approving that agreement obligated the United States to continue to hold the land on the ceded strip in trust for the Tribe pending disposition to non-Indians under various public land laws, and it provided that the Tribe would receive the proceeds of that disposition as they were realized. Art. II, 33 Stat. 357; *Ash Sheep Co.*, 252 U.S. at 164-165. The various provisions of the 1904 Act were "all intended to secure to the Indians the fullest value possible for what were referred to in the agreement as 'their lands' and to make use of the proceeds for their benefit." *Id.* at 165. "It is obvious that the relation thus established by the act between the Government and the tribe was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*." *Ibid.*

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[1] Despite the reduction in the size of its Reservation and its historically amiable relations with non-Indians, the Tribe has maintained its own language and traditions intact; more than 80% of enrolled tribal members still speak the Crow language. *American Indian Reservations and Trust Areas*, *supra*.

The surface rights to much of the land in the area covered by the 1904 Act were sold to non-Indian settlers, but the United States retained a large portion of the underlying mineral estate in trust for the Tribe. *Id.* at 19, 116. In 1958, Congress passed a law restoring to certain Indian Tribes, including the Crow Tribe, all surplus tribal lands that had been opened for non-Indian settlement but that had not been disposed of. See Act of May 19, 1958, Pub. L. No. 85-420, § 1, 72 Stat. 121. The Department of the Interior interpreted the 1958 Act as restoring 10,000 acres of surface land held by the United States, and approximately 150,000 acres of severed mineral rights in the ceded strip, to the Tribe. Pet. App. 119-121.[2] Section 2 of the Act provides that the restored lands "shall be held by the United States in trust for the respective tribe," and "such lands are hereby added to and made a part of the existing reservations for such tribe or tribes." 72 Stat. 121. Thus, the 1958 Act restored 10,000 acres of surface land and 150,000 acres of mineral estate in the ceded strip

[2] In Section 3 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 463, Congress had authorized the Secretary of the Interior to restore to tribal ownership the remaining surplus lands of any Indian reservation that had been opened to entry prior to 1934. Immediately thereafter, the Secretary temporarily withdrew all remaining surplus lands, pending restoration to the Tribes concerned. *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 Interior Dec. 559 (1934). That withdrawal order applied to both surface lands and mineral rights, *id.* at 563, and it expressly included Crow Reservation lands that had been opened under the 1904 Act, *id.* at 561. The Crow Tribe's surplus lands and reserved mineral rights on the ceded strip were not restored pursuant to Section 3 of the IRA, however, because the Crow Tribe voted not to accept the provisions of the IRA. Pet. App. 117. The 1958 Act was intended to put non-IRA Tribes on an equal footing with IRA Tribes with respect to the restoration of surplus or ceded lands. *Id.* at 118.

to the Crow Reservation in full trust status. Pet. App. 94-95, 195, 286.

b. In 1972, the Tribe and Westmoreland Resources, Inc. (Westmoreland) entered into a coal-mining lease agreement pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq*. Pet. App. 171, 200. The agreement granted Westmoreland the right to extract coal located in the ceded strip. Shortly after the lease was renegotiated and Westmoreland began mining operations, Pet. App. 122, Montana in 1975 imposed a severance tax and a gross proceeds tax on all coal produced in the State, including coal belonging to the Tribe. *Id.* at 6, 23.[3]

The severance tax rate was set at 30% of the contract sales price of the coal extracted by Westmoreland, while the gross proceeds tax rate was approximately 5% of the contract sales price. Pet. App. 25-26. The total was "more than twice that of any other state's coal taxes." *Id.* at 98 n.2.[4] It is not disputed for present purposes that the goal of those state taxes was "to appropriate most of the economic rent" from tribal coal. *Id.* at 10, 185.[5]

Before the taxes were imposed by the Montana Legislature, the Tribe expressed its strong opposition, informing the Legislature that such a rate of taxation on the extraction of tribal resources from reservation lands would improperly intrude on tribal sovereignty and self-deter-

[3] Although enacted pursuant to state statute, the gross proceeds tax was ultimately payable to petitioner Big Horn County. Pet. App. 19-20, 25-27.

[4] See also Report of the Montana Free Joint Conference Committees on Coal Taxation (Apr. 14, 1975), J.A. 63 ("It is true that this is a higher rate of taxation than that levied by any other American state on the coal industry.").

[5] "'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." Pet. App. 185 n.12.

mination. J.A. 53, 56-57. The Tribe proposed as a compromise that coal producers be given a credit against state taxes for any taxes paid to Indian Tribes. See J.A. 60-61. That proposal was rejected. Pet. App. 23. The minutes of the Montana Senate Taxation Committee explain that "[t]he feeling was that there would have to be court decreed settlements regarding Indian coal revenues." J.A. 59. As the Ninth Circuit later concluded, there was "direct evidence that the Montana Legislature was aware that the taxes were potentially preempted and expected [litigation] would be required to resolve their legality." Pet. App. 9.

Westmoreland began paying Montana's tax on the severance of tribal coal from tribal lands in 1976, and the gross proceeds tax from the sale of the coal in 1975. Pet. App. 23-27. From 1975 to 1982, for example, petitioners realized $30 million from the coal in taxes (about 79 percent of total proceeds in excess of the return to Westmoreland) while the Tribe received about $8 million in royalties (about 21 percent of those proceeds). *Id.* at 172. Of the $46.8 million in severance taxes Westmoreland paid between 1976 and 1983, a significant percentage was placed in a Montana trust fund containing only the proceeds of severance taxes imposed on Montana coal producers. *Id.* at 24-25, 173; see *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 613 (1981). As of June 30, 1993, the book value of that trust fund was in excess of $500 million. J.A. 25.

c. In 1976, the Tribe enacted its own severance tax of 25% of the contract price of coal mined on the Reservation. Pet. App. 19. The Department of the Interior approved the tax except as applied to coal mined from beneath the ceded strip. J.A. 283. The Department believed taxation on the ceded strip was beyond the power of the Tribe under Article IV, Section 20 of its Constitution, which author-

ized the Tribe to impose taxes upon nonmembers only when they were "doing business within the boundaries of the Crow Indian Reservation." J.A. 283.

The court of appeals subsequently held, however, that the mineral estate under the surface of the ceded strip in fact formed part of the Reservation. Pet. App. 94-95, 195. As a result, the district court concluded in 1988 that the Department's approval of the tax as applied to coal mined within the Reservation "was necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow Tribal coal" on the ceded strip. *Ibid.* The district court explained (*ibid.*):

> [T]he Reservation status of the Crow coal compels the conclusion that the approval which the Department of the Interior gave to the 1976 tax ordinance was fully applicable to Westmoreland's mining of Crow Ceded Strip coal because that coal was and is a component of the Reservation land itself. The approval of the Department of Interior of the 1976 Crow Tribal Tax Code as it applied to activities on the Reservation was necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow Tribal coal.[6]

Westmoreland did not pay taxes to the Tribe between 1976 and 1982. Instead, it challenged the validity of the Tribe's tax as applied to coal extracted from the ceded strip. Westmoreland's "objection to the tribal tax was motivated by the desire to avoid concurrent taxation" by Montana and the Tribe—which would have produced total tax rates exceeding 50%—and by concerns that it could not pass on to utility customers the costs of a tax absent approval by the Department of the Interior. Pet. App. 31.

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[6] Petitioners did not dispute that conclusion in the court of appeals, and they do not dispute it here.

In a 1982 amendment to its lease, approved by the Secretary, Westmoreland agreed to pay a tribal tax equal to that imposed by Montana, subject to a credit for all severance and gross proceeds taxes it was required to pay to Montana. *Id.* at 31-32; J.A. 135-141. Because of the higher taxes imposed by Montana, that offset prevented the Tribe from receiving any tax revenues until the enforcement of Montana's taxes was enjoined. J.A. 217.

2. This suit was initiated by the Crow Tribe in 1978 against the State of Montana, the counties of Big Horn, Yellowstone, and Treasure, and various state and county officials. The Tribe challenged the legality of the severance and gross proceeds taxes, arguing that they were preempted by federal law. Pet. App. 19. The district court dismissed the complaint for failure to state a claim. *Id.* at 197-227. The court of appeals reversed and remanded. *Id.* at 167-196. It held that the Tribe had alleged facts which, if proven, would establish that the challenged taxes were preempted by the Indian Mineral Leasing Act and infringed the Tribe's sovereignty and right of self-government. *Id.* at 185-196.

On remand, the district court in January 1983 enjoined Westmoreland's payment of the state severance tax, and ordered Westmoreland to deposit into the registry of the court amounts equal to those payable under the severance tax. Pet. App. 35. The prevailing party, the court held, would be entitled to the proceeds of the taxes so paid.[7] Also in 1983, the United States intervened on behalf of the Tribe in order to protect the United States' interests as trustee of the coal upon which Montana's taxes were levied. Pet. 5 n.2.

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[7] A similar order was entered as to the gross proceeds tax in 1987. Pet. App. 35.

3. After a trial in January 1984, the district court ruled for petitioners, holding that the taxes on tribal coal extracted from the ceded strip were not preempted by federal law. Pet. App. 110-166. The court of appeals reversed, *id.* at 88-109, holding that the severance and gross proceeds taxes on the Tribe's coal caused the Tribe significant injury (*id.* at 97):

> The state taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

Because the taxes interfered with the "firm federal policy of promoting tribal self-sufficiency and economic development," *id.* at 95, the court of appeals held that they were presumptively preempted, unless supported by a sufficient state interest, *id.* at 100.

Montana, the court continued, had not carried the "heavy burden" of establishing that its taxes on the Tribe's coal were narrowly tailored to support legitimate state interests. Pet. App. 103. To the contrary, the court explained, the evidence indicated that the coal taxes were not necessary to compensate Montana for the costs created by coal mining because revenues from state, local, and excise taxes on the mining activity were more than sufficient to offset the coal-related costs documented by Montana. *Id.* at 103-105. In addition, most of the revenue from the challenged taxes was devoted to purposes other than environmental and coal-related services. *Id.* at 104. As a result, the court of appeals concluded, Montana imposed its taxes on the Tribe's coal "to profit from the Indians' valuable coal resources" and not to fund services

required as a result of the coal mining activity. *Ibid.* Because Montana had no legitimate interest in appropriating the Tribe's mineral wealth, the court held, Montana's severance and gross proceeds taxes were not narrowly tailored to advance legitimate state interests, and thus were preempted by federal law. *Id.* at 105. For similar reasons, the court of appeals held that the taxes constituted an unlawful infringement upon the Tribe's sovereignty. *Id.* at 105-107.

Montana appealed to this Court, which summarily affirmed the judgment of the court of appeals. 484 U.S. 997 (1988). And the Court specifically declined to reexamine that holding the next Term when it sustained far more modest state severance taxes in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163 (1989). In so doing, the Court distinguished the taxes at issue here on the ground that they were "extraordinarily high"—producing a combined rate of "more than twice that of any other state's coal taxes"—and "imposed a substantial burden on the Tribe." *Id.* at 186 & n.17.

4. The case then returned to the district court for further proceedings. In 1989, the district court ordered transfer to the Bureau of Indian Affairs, to be held in trust for the Tribe, of the tax payments that Westmoreland had been depositing into the court's registry pursuant to the district court's earlier orders. Pet. App. 35. Those funds represented Westmoreland's severance tax payments beginning in 1983 and its gross receipts tax payments beginning in 1987, along with accumulated interest. *Ibid.*

The parties then turned their attention to the tax payments Westmoreland had made during the period between 1975 and the dates of the orders directing Westmoreland to deposit tax payments into the court registry. The United States and the Tribe filed amended complaints in which they sought to recover those payments, which

totalled approximately $58 million. Pet. App. 24-27, 243-260. They argued that the taxes had been determined to be unlawful, that Montana therefore was not entitled to retain the proceeds of the taxes, that the taxes had substantially injured the Tribe, and that the Tribe and the United States (as trustee of the coal that had been unlawfully taxed) were entitled to the proceeds of the unlawful taxes. *Id.* at 243-260.

Montana moved for summary judgment on various grounds, including that the district court lacked jurisdiction over what it asserted were, in reality, state-law claims for restitution; it also argued that in any event the United States and the Tribe had failed to make out the essential elements of the theories of restitution upon which they had relied. Pet. App. 72. The district court denied the motion for summary judgment, reasoning that the Tribe's request for restitution sounded in federal law and the federal courts have "broad equitable powers to construct a remedy" for the violation of federal law. *Id.* at 76. The district court further concluded that its power to fashion an equitable remedy under federal law was not limited by the scope of state-law causes of action for restitution. *Id.* at 79-84. Finally, the district court ruled that the question whether any equitable remedy (or which equitable remedy) would be appropriate turned on unresolved factual matters. *Id.* at 85.

The district court certified its order denying summary judgment for interlocutory appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 61-66. Although the court of appeals originally granted permission for an interlocutory appeal, it subsequently concluded that permission to appeal had been improvidently granted and dismissed the appeal. *Id.* at 58-60. In so doing, the court of appeals explained that, in *Crow I* and *Crow II*, it had already rejected the contention

that the United States and the Tribe could not recover the proceeds of Montana's unlawful taxes. *Id.* at 59-60.

5. After conducting a second trial in 1994, Pet. App. 22-23, the district court denied restitution. *Id.* at 42-54. The district court relied on a number of factors that it believed undermined the United States' and the Tribe's claim of an equitable entitlement: (1) the Tribe did not provide significant governmental services to the ceded strip; (2) Montana's coal severance tax had been found to be lawful, as against Commerce Clause and Supremacy Clause challenges, in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981); (3) Montana provided certain governmental services to the Tribe; (4) the unlawfulness of Montana's coal taxes was not obvious during the relevant period; (5) the Tribe did not pay the taxes at issue, and Westmoreland, which had paid the taxes, had not sought to avoid or recover them; (6) the Tribe could have taken steps to try to cause Westmoreland to challenge Montana's taxes; and (7) even if Montana had not imposed the coal taxes, the Tribe would not have been able to impose a tax on the coal mined by Westmoreland, because the Department of the Interior had not approved the Tribe's effort to impose such a tax on coal mined in the ceded strip. Pet. App. 47-52.

6. The court of appeals reversed in relevant part, Pet. App. 1-16, holding that the district court had erred in concluding that the United States and the Tribe were not equitably entitled to the proceeds of the unlawfully imposed taxes, *id.* at 7-12. Although the Tribe had not paid the taxes at issue, the court held that the Tribe had stated a claim for equitable relief, because the taxes "had an adverse impact on the Tribe's ability to market its coal, increased the costs of coal production, and reduced the royalty the Tribe could charge, 'taking revenue that would

otherwise go towards supporting the Tribe and its programs.'" *Id.* at 11 (quoting *Crow II*, Pet. App. 107).[8]

The court of appeals further held that the factors the district court relied upon to reach a contrary conclusion were either irrelevant or contrary to earlier holdings of the court of appeals. Pet. App. 7-12. Specifically, it concluded that the trial court had ignored direct evidence that the Montana Legislature was aware that its coal taxes were potentially preempted, but had not put the contested revenues in escrow until well after the Tribe's lawsuit was underway. *Id.* at 9 & n.3. The court of appeals also emphasized its earlier holding, in *Crow I*, that Montana's coal taxes were "intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal." *Id.* at 10. Finally, the court of appeals rejected the district court's reliance on the fact that Montana provided government services to the Tribe, because Montana would have furnished those services even if there had been no coal mining and because the costs to Montana of any coal-related services were more than

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[8] The court of appeals distinguished *United States* v. *California*, 507 U.S. 746 (1993). In that case, the United States had reimbursed a government contractor for state taxes the contractor had paid to California. Claiming that the taxes had been assessed in violation of state law, the United States sought to recover them in federal court. This Court held that the United States did not have a federal cause of action to recover the funds, because the contractor had settled its tax liability with California, there was no claim that California's taxes violated federal law, and the United States had failed to seek tax relief under applicable state procedures. *Id.* at 751-759. The court of appeals in this case pointed out that *California* was a case in which the United States had voluntarily agreed to reimburse its contractor, while the Tribe in this case had done nothing comparable. Pet. App. 16. It also pointed out that there had been no determination in *California* that California's tax was unlawful. *Id.* at 8 n.2.

offset by revenues from coal-related taxes other than those at issue. *Id.* at 11.

In sum, the court of appeals concluded (Pet. App. at 12):

> The equities in favor of restoring improperly collected revenues to the entity entitled to receive them are strong. Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

The court of appeals therefore remanded the case for entry of an order directing Montana and Big Horn County to disgorge the unlawfully obtained taxes. *Id.* at 12. The court did not resolve outstanding disputes about whether the Tribe was entitled to prejudgment interest and attorney's fees. *Id.* at 12, 14.[9]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners no longer dispute that they obtained $58 million through unlawful taxes assessed on reservation coal owned by the Tribe. Nor do they dispute the conclusion—accepted by this Court—that their "unique," "unusually large," and "extraordinarily high" taxes "imposed a substantial" and unlawful "burden on the Tribe."

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[9] Before the district court, the United States and the Tribe had also sought additional relief on the ground that Montana's taxes had prevented the Tribe from entering into a lease with Shell Oil Co. for the mining of other coal owned by the Tribe. The district court denied relief because of a failure to show that the unlawful coal taxes were the cause of the breakdown of the relationship between the Tribe and Shell Oil Co. (Pet. App. 55), and the court of appeals affirmed the district court's judgment for similar reasons (*id.* at 12-14). This Court denied the Crow Tribe's cross-petition for a writ of certiorari seeking review of that ruling. 118 S. Ct. 73 (1997).

Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163, 186 & n.17 (1989). Instead, they argue that they must be permitted to retain the profits of their wrongdoing. Federal courts, they contend, are powerless to require disgorgement of the proceeds from even uncontested violations of federal law.

Petitioners' position is supported by neither logic nor law. To the contrary, it is well established that federal courts may, under their equitable powers, require parties like petitioners to disgorge the proceeds of their unlawful conduct. And that is precisely what the Ninth Circuit did below, requiring petitioners to return their unlawful profits to the Tribe, the owner of the coal from which petitioners had "intentionally and illegitimately * * * appropriate[d] most of the economic rent." Pet. App. 10.

Petitioners' contrary arguments, including their reliance on *United States* v. *California*, 507 U.S. 746 (1993), are premised on a fundamental legal error: Petitioners confuse the question of whether a cause of action under federal law exists (the question in *California*) with the question of the availability of equitable remedies under a cause of action that is conceded to exist (the question here). Once that analytical error is eliminated, the primary basis for petitioners' arguments—and petitioners' reliance on *California*—evaporates.

California held that, where state taxes were alleged to have been obtained in violation of state rather than federal law, the United States does not have a federal cause of action for their recovery simply because it reimbursed the contractor that paid the taxes. "[T]he Government cannot use the existence of an obligation to indemnify [its contractor] *to create a federal cause of action* for money had and received." 507 U.S. at 754 (emphasis added). Here, in contrast, there is no question as to whether the United States and the Tribes have a federal cause of action.

Repeatedly this Court and others have entertained actions, like this one, in which the United States or a Tribe challenges official conduct that interferes with the United States' fulfillment of its obligations to the Tribes or intrudes improperly upon the Tribe's federally guaranteed rights. Indeed, this Court has held that the United States and the Tribes may seek to enjoin such unlawful state activity notwithstanding the terms of the Tax Injunction Act, 28 U.S.C. 1341, which otherwise bars district courts from enjoining or setting aside state taxes. *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-475 (1976).

The question in this case thus is not whether a cause of action exists. It is whether the remedy of disgorgement is available now that the Tribe and the United States have prevailed in establishing the illegality of the taxes at issue. Under this Court's precedents, the answer to that question is yes. Where a federal cause of action exists, federal courts properly "presume the availability of all appropriate remedies * * * unless Congress has expressly indicated otherwise." *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992). Indeed, this Court expressly has held that "[i]t is readily apparent * * * that a decree compelling one to disgorge profits, rents or property acquired in violation of [federal law] may properly be entered by a District Court once its equity jurisdiction has been invoked," and that "[n]othing is more clearly a part of the subject matter of a suit for an injunction * * * than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946).

Petitioners' remaining contentions are likewise without merit. While petitioners assert that the United States and the Tribe have not shown that they have a common-law

cause of action for assumpsit or "quasi-contract," the Tribe and the United States do not need to make such a showing. Having prevailed on their federal cause of action, they are entitled to the equitable remedy of disgorgement. And, in any event, the United States and the Tribe have proven their claim under the common law, and their right to the remedy of a constructive trust. Nor can it be contended that disgorgement is necessarily a legal, rather than equitable remedy, as petitioners suggest. Disgorgement, and constructive trusts in particular, are equitable in nature.

Finally, petitioners' contention that federalism concerns preclude relief is fundamentally mistaken. Montana law makes the remedy of disgorgement available when one of Montana's political subdivisions imposes taxes in derogation of the rights of another. It is fully consistent with our federal constitutional structure—under which the States ceded to the National Government the responsibility for Indian affairs—for a federal court to impose a similar remedy for Montana's knowing and unlawful taxation of the Tribe's coal in violation of the Tribe's sovereign rights and the United States' sovereign obligations under federal law.

ARGUMENT

I. THE UNITED STATES AND THE TRIBE HAVE A CAUSE OF ACTION, AND ARE ENTITLED TO FULL RELIEF, FOR PETITIONERS' INFRINGEMENT OF THE TRIBE'S FEDERALLY PROTECTED RIGHTS

As this Court repeatedly has recognized, the question whether there is a cause of action that a party may bring and the question of what relief is available under that cause of action are "analytically distinct." *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992).

When a court considers if there is a cause of action, it inquires whether the plaintiff is a proper party to bring suit for the asserted violation; when a court considers the question of remedies, it looks to what sorts of relief may be imposed if the plaintiff prevails on its cause of action. *Ibid.*; see 1 D. Dobbs, *Law of Remedies* § 1.6, at 25-27 (2d ed. 1993). This Court articulated that distinction in *Davis* v. *Passman*, 442 U.S. 228, 239 (1979):

> If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a "cause of action" * * *. So understood, the question whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive. The concept of a "cause of action" is employed specifically to determine who may judicially enforce the * * * rights or obligations.

See also *id.* at 240 n.18.[10]

Applying that well-established structure to this case demonstrates that petitioners' arguments are without merit. Here, there can be no dispute that the United States and the Tribe have a cause of action. This Court and other courts have for decades recognized a cause of

[10] Where only private plaintiffs are concerned, the Court has been cautious about recognizing rights of action to enforce an Act of Congress in the absence of legislative guidance; to recognize such private rights of action, the Court has explained, risks expansion of the judicial power. See *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990). Even in cases involving private plaintiffs, however, the Court has stated that "[u]nlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power." *Franklin*, 503 U.S. at 73-74. Because of the far broader right of the United States to sue to vindicate its sovereign interests, it follows *a fortiori* that the courts should have broad powers to fashion an appropriate remedy in such a suit.

action for, and entertained virtually indistinguishable challenges to, unlawful intrusions upon federally guaranteed Indian rights. See pages 19-22, *infra*. Nor can there be any dispute that federal courts have equitable authority to impose a restitutionary remedy. Such a remedy has long been considered inherent in the equitable authority of federal courts, and there is no good reason to find it unavailable here. Indeed, courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise," *Franklin*, 503 U.S. at 66. See pp. 22-25, *infra*. That is especially so where, as here, the United States sues to protect property it holds in trust for Indian Tribes and the sovereign interests of the Tribes themselves.

A. The United States And The Tribe Have A Cause Of Action

It is firmly established that federal law provides both the United States, as trustee for the Indian Tribes, and the Tribes themselves, with a cause of action to challenge conduct by state and local governments that unlawfully impinges upon land held in trust by the United States for the Indians or upon other tribal interests protected by federal law. This Court has long entertained such actions by the United States. See, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413, 442 (1912) ("[T]he United States [was] entitled to prosecute this suit by virtue of the interest springing from its peculiar relations to the Indians and the course of dealing which had finally led to the plan of separate [Indian] allotments accompanied by restrictions for the protection of [Indian] allottees"); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926) (United States has the "right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations" to the Indian Tribes).

As this Court has said with respect to the origins of the duty of protection of Indians by the United States generally:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. * * * From their weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

United States v. *Kagama*, 118 U.S. 375, 383-384 (1886).[11] Suits by the United States to protect Indian property and other rights therefore represent an especially appropriate occasion for invocation of the principle that "[e]very government * * * has a right to apply to its own courts for any proper assistance in the exercise of [its powers] and the discharge of [its duties]." *In re Debs*, 158 U.S. 564, 584 (1895).[12]

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[11] See also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (noting relationship of the United States to Indian Tribes "resembles that of a ward to his guardian"); *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974) ("unique obligation" toward Indians); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("unique trust relationship between the United States and the Indians"); *Lincoln* v. *Vigil*, 508 U.S. 182, 195 (1993).

[12] See *United States* v. *Board of County Comm'rs*, 251 U.S. 128, 133 (1919) ("Certain is it that as the United States as guardian of the Indians had the duty to protect them from spoliation and, therefore, the right to prevent their being illegally deprived of the property rights conferred [upon them by Congress], the power existed in the officers of the United States to invoke [judicial] relief for the accomplishment of [that] purpose.").

Indian Tribes may also sue in their own name to prevent imposition of state and local action that interferes with their federally guaranteed rights. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 236 (1985) (Tribe may bring federal common law action for violation of federally guaranteed possessory rights). Similar actions have been entertained by Anglo-American courts for more than a century and a half. *Id.* at 235 (citing *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), and *Marsh* v. *Brooks*, 49 U.S. (8 How.) 223, 232 (1850)). Congress has confirmed that authority in 28 U.S.C. 1362, in which the Tribes in certain respects are accorded treatment similar to that of the United States when it sues on their behalf. 28 U.S.C. 1362; see *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 474 (1976); *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 784 (1991); see also *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (challenge by Tribe to cigarette and automobile taxes alleged to be inconsistent with Indian self-governance and sovereignty).

Indeed, this Court has held that federal courts may hold unlawful and enjoin state taxing schemes that improperly intrude on Indian sovereign rights in contravention of federal law, notwithstanding the Tax Injunction Act, 28 U.S.C. 1341, which otherwise bars district courts from enjoining or setting aside state taxes. *Moe*, 425 U.S. at 473-475; *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 761 n.2 (1985) (suit by Indian Tribe "to enjoin the enforcement of" state tax law "cognizable" in federal court; upholding injunction against challenged tax).

It is thus far too late in the day to argue that the United States and the Tribe have no federal cause of action to vindicate the Tribe's federally guaranteed rights against unlawful intrusion. Petitioners do not contend otherwise. See Pet. Br. 44 n.8 (listing numerous cases). Instead,

petitioners' only contention is that, even when a violation of a Tribe's federal rights is found, the federal courts lack authority to order the remedy of disgorgement. As we explain below, however, that cramped view of the remedial powers of the federal courts is inconsistent with settled law and this Court's precedents.

B. Federal Courts Have Authority To Provide A Full Remedy For Violations Of The Tribe's Federally Guaranteed Rights

1. The principle that federal courts have "power to award appropriate relief so long as a cause of action exist[s] under the Constitution or laws of the United States" has "deep roots" in this Nation's jurisprudence. *Franklin*, 503 U.S. at 66. "From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court." *Ibid.* Indeed, even before this Nation was formed, the full and expansive remedial authority of courts was well established "in the English common law, and Blackstone described it as 'a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'" *Id.* at 66 (quoting 3 W. Blackstone, *Commentaries* 23 (1783), and citing *Ashby* v. *White*, 87 Eng. Rep. 808, 816 (Q.B. 1702)).

Following those principles, this Court has held in a "long line of cases" that, "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Franklin*, 503 U.S. at 69; accord *id.* at 68. And in a suit for equitable relief, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and

flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

The United States has repeatedly invoked the equitable powers of the federal courts to assist it in the protection of the Indian Tribes against unlawful encroachments by state and local governments, as well as by individuals. See, *e.g.*, *Ash Sheep Co.*, *supra* (suit to enjoin unlawful grazing of cattle on ceded strip of Crow Reservation); *United States* v. *Board of County Comm'rs*, 251 U.S. 128, 133-134 (1919) (upholding right of United States "to invoke the interposition of" a federal court in "equity" to prevent imposition of unjust and discriminatory taxes on lands belonging to the Indians); *Heckman*, *supra* (suit to cancel conveyances of Indian land made in violation of federal law); *United States* v. *Rickert*, 188 U.S. 432, 432 (1903) (suit by United States "for the purpose of restraining the collection of taxes" assessed by a State against members of the Sioux Tribe).

2. The equitable powers of federal courts include the authority to order the disgorgement of gains obtained in violation of federal law. This Court so explained over half a century ago: "It is readily apparent * * * that a decree compelling one to disgorge profits, rents or property acquired in violation of [federal law] may properly be entered by a District Court once its equity jurisdiction has been invoked," unless "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946). "Nothing is more clearly a part of the subject matter of a suit for an injunction," the Court continued, "than the recovery of that which has been illegally acquired and which has given rise to the

necessity for injunctive relief." *Id.* at 399;[13] see also *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960) ("As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'") (quoting *Clark* v. *Smith*, 38 U.S. (13 Pet.) 195, 203 (1839)).

The remedy of restitution has been awarded, moreover, in the specific context of wrongful state intrusions into federally guaranteed Indian rights. See, *e.g.*, *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939) (recovery of taxes imposed on Indians in violation of federal law). Indeed, in *Ward* v. *Board of County Commissioners*, 253 U.S. 17 (1920), this Court held that such a remedy for the benefit of Indians could not be denied, declaring that, "if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Id.* at 24.

It is precisely that established equitable authority that the court below exercised in this case. After reviewing the equities—including the facts that Montana acted "with wrongful intent," and that the Tribe was substantially injured as a result, Pet. App. 9-12—the court of appeals concluded that "[t]he equities in favor of restoring improperly collected revenues" to the Tribe are "strong" and that Montana should not be permitted to benefit from having "levied the unlawful taxes with the illegitimate

[13] The ability of equity courts to require restitution in the form of disgorgement has been recognized from the earliest times. As Professor Palmer explains: "In equity it has been traditional to hold a wrongdoer accountable for profits realized through the wrongful act." 1 G. Palmer, *The Law of Restitution* § 2.12, at 158 (1978); accord 2 Dobbs, *supra*, § 6.6(3), at 146 ("Equity * * * made the wrongdoer liable for any profits gained from his wrong.").

intent of appropriating most of the economic rent from the Tribe's coal." *Id.* at 12.[14]

II. NEITHER *UNITED STATES* v. *CALIFORNIA* NOR REFERENCE TO COMMON-LAW FORMS OF ACTION BARS RELIEF IN THIS CASE

Notwithstanding the inherent equitable authority of federal courts to fashion appropriate relief under established causes of action, petitioners argue that the courts below had no such power here. In particular, they argue that such relief is barred by this Court's decision in *United States* v. *California*, 507 U.S. 746 (1993) (Br. 25-33); that it is not consistent with the principles of the common law cause of action for "quasi-contract" or assumpsit (Br. 25-27, 37-40); and that it cannot be justified as "equitable" relief because it is legal in nature (Br. 26, 36-37). None of those arguments has merit.

A. *United States* v. *California* Does Not Address The Availability Of The Disgorgement Remedy Where, As Here, A Federal Cause Of Action Exists

Petitioners' primary contention is that this Court's decision in *California* precludes the relief provided in this case. That argument, however, "mirrors the very misunderstanding over the difference between a cause of action and the relief afforded under it that sparked the confusion

[14] Even the district court, which declined in the end to order restitution in the circumstances of this case, nevertheless recognized the broad remedial power of the federal courts to do so. Rejecting petitioners' motion for summary judgment (which argued that the United States and the Tribe had raised only state-law claims that were not appropriate for federal jurisdiction), the district court stated: "Having established a violation of significant tribal interests based upon treaty and federal law, this Court has broad equitable powers to construct a remedy patterned after a state common law remedy." Pet. App. 76.

[this Court] attempted to clarify in *Davis*." *Franklin*, 503 U.S. at 69; see *Davis*, 442 U.S. at 239.

1. In *California*, this Court did not confront a question of remedies. Instead, it considered whether the United States had a federal cause of action in the first place. The United States sought to recover taxes that a federal contractor had paid to the State of California. 507 U.S. at 749. The state taxes were not alleged to have violated any federal right or distinct sovereign interest of the United States. Thus, the Court stated: "Unlike the typical tax immunity case, * * * we are not presented with a claim that the state tax is unconstitutional; instead, the question is whether the Federal Government may recover taxes it claims were wrongfully assessed under California law."[15]

Although the taxes were paid by a third party in violation of state rather than federal law, the United States argued that it had a federal cause of action to recover the taxes because it was obligated to indemnify its contractor, which had paid the taxes. This Court rejected that argument, holding that "the Government cannot use the existence of an obligation to indemnify [its contractor] to create a federal cause of action for money had and received." 507 U.S. at 754. As the Court summarized its holding:

> Today we hold that shouldering the "entire economic burden of the levy" through indemnification *does not give the Federal Government a federal common-law cause of action* for money had and received to challenge

[15] Accord 507 U.S. at 749 (claim was that "the State had misapplied its own law, taxing property that was outside the scope" of the relevant taxing provision); *ibid.* (United States' suit was predicated on claim that "California had classified and taxed" its contractor "erroneously under California law"); *id.* at 758 ("state-law action").

> a state tax on state-law grounds simply because it is the Government.

Id. at 759-760 (citation omitted; emphasis added).

The holding in *California* has no bearing on this case. Here, unlike in *California*, the question before the Court is not whether federal law provides a cause of action; it is settled that federal law does provide a cause of action for unlawful state infringement of federally guaranteed Indian rights. See pp. 19-22, *supra*. The only question is whether, given the existence of that cause of action, federal courts may invoke their broad equitable powers to fashion an appropriate remedy (in this case, disgorgement) for its violation. The answer to that question is not found in *California*'s holding that there is no federal cause of action for money obtained from a third party in violation of state law. It is instead found in the myriad cases holding that, "if a right of action exists to enforce a federal right," then "a federal court may order *any* appropriate relief." *Franklin*, 503 U.S. at 69 (emphasis added).[16]

[16] There are other significant distinctions between the present case and *California*. In *California*, the United States had voluntarily chosen to indemnify its contractor for state taxes, while in the present case Montana's illegal coal taxes were imposed over the Tribe's opposition. In *California*, the United States had failed to take advantage of administrative and state court proceedings in which it could have contested the legality of the state tax at issue, and had waited for years after the taxes were demanded to seek relief in federal court. 507 U.S. at 751, 756-759. In contrast, the Tribe in the present case promptly challenged the legality of Montana's coal taxes in the appropriate forum. Finally, in *California*, the United States was seeking relief not in its sovereign capacity, but rather simply by virtue of its contractual arrangements with a private party. *Id.* at 757. In the present case, the United States and Tribe are seeking redress for the exaction of coal taxes that were found to have "impermissibly eroded the Tribe's sovereign authority." Pet. App. 6. Those differences fully justify the

2. Furthermore, in *California*, the United States' claim not only was based on an asserted violation of state law, but also was purely derivative of the state-law rights held by its contractor. As the Court explained, "a federal action is inappropriate * * * because the Government is in no better position than as a subrogee of its contractor," which had only state-law claims. 507 U.S. at 752.

Here, in contrast, the parties that have brought this suit—the United States and the Tribe—are the direct holders of the very rights they assert; there can be no argument that their claims are derivative of those of another party.[17] Thus, unlike in *California*, it cannot be said that the United States and the Tribe are in "no better position than as a subrogee," 507 U.S. at 752, or in a worse

court of appeals' observation that "*California* involved an entirely different factual situation" from that of the present case. *Id.* at 16.

[17] Petitioners err in asserting (Br. 30 n.5) that the "Tribe's position with respect to the Montana taxes * * * was comparable for quasi-contract purposes to the United States' in *California*; i.e., the taxes did not invade the *Tribe's* immunity from state taxation." The United States could not claim a violation of its federal rights in *California*, since this Court had previously held that States may tax federal contractors even if the burden of such taxes ultimately falls upon the United States. *United States* v. *New Mexico*, 455 U.S. 720, 733-735 (1982). Here, in contrast, the Tribe is asserting its own federal rights. As the Court explained in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. at 468 n.7:

> Our conclusions * * * that the District Court, with subject-matter jurisdiction over the Tribe's claims, properly entered injunctive relief in its favor implicitly embrace a finding that the Tribe, *qua* Tribe, has a discrete claim of injury with respect to these forms of state taxation so as to confer standing upon it apart from the monetary injury asserted by the individual Indian plaintiffs. Since the substantive interest which Congress has sought to protect is tribal self-government, such a conclusion is quite consistent with other doctrines of standing.

position, as petitioners contend (Br. 32-33). To the contrary, they are in a superior position, making a direct claim for violation of their *own* rights.[18]

B. Petitioners Distort The Nature Of The Relief Offered And Misconstrue Common-Law Principles

In addition to arguing that *California* announces an absolute rule barring recovery of restitution by the United States in a federal cause of action such as this—an argument we have shown in point A to be mistaken—petitioners attempt to derive similar barriers to relief from the common law. In particular, petitioners read (see Br. 29) the result in *California* as resting on a fixed premise concerning the nature of quasi-contractual relief —that recovery is prohibited in the absence of a relationship of "privity" between the claimant and the sovereign that collected the unlawful tax, such as where the claimant was the "payor" of the tax. At common law, petitioners assert (Br. 25-27), only the "payor" could recover under quasi-contract. See also Br. 36-40. Even the district court, which in the end declined to order relief on other grounds, rejected those arguments, Pet. App. 79-85, and properly so.

1. Like petitioners' reliance on *California* more generally, this argument too confuses the concept of a cause

[18] Petitioners insist (Br. 34-35) that it makes no difference that the taxes at issue in *California* were obtained in violation of state rather than federal law. But the only authority that petitioners cite for that proposition is the United States' brief in *California* itself. That brief cannot be taken as persuasive authority in a case in which the Court rejected the United States' position. In any event, the nature of the violation—specifically, whether it contravened state law or federal law —is unquestionably an important factor in determining whether to recognize a *federal* cause of action. Absent a sufficient federal interest (which was found lacking in *California*), violations of state law give rise only to state causes of action.

of action with the nature of the remedy sought. As Professor Dobbs explains in his treatise (1 Dobbs, *supra*, § 1.6, at 27):

> The theory invoked to justify relief is not a remedy. Nor is a named cause of action. For instance, "assumpsit," was a form of action at common law which connoted both a certain theoretical justification for relief and a remedy. The term assumpsit might be used loosely to refer to the remedy available, but the cause of action itself is not a remedy, nor is the form used to prosecute it.

Whether or not the United States and the Tribe had a state-law cause of action for "assumpsit" (or for the subset of assumpsit known as quasi-contract) under common law is thus irrelevant. What matters is that they *do* have a federal cause of action based on unlawful intrusion into federally guaranteed rights. Once that federal cause of action is properly invoked—and here the United States and the Tribe not only invoked it but prevailed—the federal courts have authority to award any appropriate remedy. See pp. 19, 22-25, *supra*; Pet. App. 76 ("Having established a violation of significant tribal interests based upon treaty and federal law, this Court has broad equitable powers to construct a remedy patterned after a state common law remedy.").

Indeed, retreat into a cramped formalism derived from common-law forms of action (for "assumpsit" or "quasi-contract") is wholly inappropriate here, where the need for federal courts to have flexibility in establishing remedies for federal wrongs is largely unquestioned. "[T]he obligation to do justice rests upon all persons, natural and artificial, and if [the government] obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

Chapman v. *County of Douglas*, 107 U.S. 348, 355-356 (1883); see also *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."). That is especially so in a case in which the United States invokes the equitable powers of the federal courts in order to ensure that the Nation honors its trust responsibility to the Indian Tribes and to protect the Tribes' sovereign interests.[19]

2. Even if we assume, arguendo, that the requirements of the common-law forms of action have some bearing on the availability of equitable relief for violations of federal law, proper analysis supports the judgment of the court below. The doctrine of quasi-contract is based on the historical legal fiction, developed at common law, that the law "implies" a contract between the parties—even where no agreement between the parties exists at all, such as where the defendant stole the plaintiff's watch—when necessary to prevent unjust enrichment. See generally 1 Dobbs,

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[19] To be sure, the ancient causes of action were referred to in the United States' and the Tribe's complaints, see Pet. Br. 25, but that makes no difference. Under modern pleading and practice rules, "[i]t surely ought to be of supreme irrelevance that the plaintiff's complaint speaks the ancient language of *money had and received* rather than *goods sold and delivered*, or that it uses any such terms at all." 1 Dobbs, *supra*, § 4.2(3), at 586 (footnote omitted).

supra, § 4.2(1), at 571-572.[20] Petitioners assert that the law will not "imply" a contract unless the claimant is in privity with the defendant, such as where the claimant is the "payor" of the unlawful taxes. See Br. 27, 30-31; see also Br. 29 (characterizing *California* as refusing to "imply a contract" between the United States and California where the taxpayer, not the United States, dealt with California, "because the taxing entity cannot be held responsible for whatever obligations the taxpayer may have with [the United States]").

The district court properly rejected that contention as without support in a case like this one. Pet. App. 80-81. Contrary to petitioners' position, a privity requirement has been repudiated by the courts where, as here, the claim is between two sovereigns over taxes allegedly paid to one sovereign in contravention of the rights of another. *Ibid.* Indeed, it is settled law in numerous States—in-

[20] As Professor Dobbs explains, the "implication" of a contract was a necessary adaptation in light of the limited forms of action or writs available at common law (1 Dobbs, *supra*, § 4.2(1), at 571):

> The common law forced the plaintiff to sue under one of a limited number of forms of actions or writs. Assumpsit was a good choice, but to make it work it was necessary for judges to relate the claim to some kind of contract, promise or undertaking. The common law judges were up to the task. They simply said that, although the defendant had promised nothing, if justice called for relief, then the law would imply a promise and then hold him liable on that implied promise.
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>
> Courts explained liability in assumpsit [in such cases] by saying that the defendant was liable on an implied contract. Because the term "implied contract" might be confused with the idea of an implied in fact contract, judges sometimes use the term "implied in law contract" instead * * *. Another term for the implied in law contract is quasi-contract.

cluding Montana—that one taxing authority may recover taxes unlawfully imposed within its jurisdiction by another authority. Thus, in *Valley County* v. *Thomas*, 97 P.2d 345 (1939), the Montana Supreme Court held that Valley County could recover from McCone County taxes unlawfully obtained by the latter. Rejecting the very argument petitioners raise today—that only the payor could obtain the wrongfully assessed taxes—the court held that restitution was available despite the absence of privity. *Id.* at 366. Creating such obstacles to recovery, the court held, would be particularly inappropriate "in view of the general constitutional and legislative intent in Montana to do justice as directly as orderly processes permit, without unnecessarily circuitous, multiplici[t]ous or otherwise burdensome proceedings." *Ibid.*[21]

Numerous cases are to the same effect. See, *e.g.*, *Board of Highway Commissioners* v. *City of Bloomington*, 97 N.E. 280, 284-285 (Ill. 1911); *Humboldt County* v. *Lander County*, 56 P. 228 (Nev. 1899); *City of Salem* v. *Marion County*, 36 P. 163, 165 (Or. 1894) (rejecting privity requirement so as to permit city to recover taxes unlawfully collected by county). Indeed, this Court has entertained a similar action. See *Maryland* v. *Louisiana*, 451 U.S. 725,

[21] Petitioners cannot distinguish these cases by arguing that the Tribe did not have a valid competing tax here. As explained above (see p. 7, *supra*) and below (note 33 *infra*), the Tribe "[a]t all relevant times * * * had a valid coal mining tax applicable to the mining by Westmoreland," J.A. 286, which was not paid as a result of petitioners' unlawful duplicative taxation. Moreover, there is no logical reason why the rule that privity is not required in cases where one jurisdiction seeks to require disgorgement of a tax wrongfully collected by another should be confined to situations where the plaintiff jurisdiction has a competing tax. The prior rulings by the courts below in this case, which this Court has previously affirmed, make clear that the collection of the extraordinarily high state taxes deprived the Tribe of its ability to collect revenues in an equivalently concrete manner.

734, 753-760 (1981) (holding Louisiana tax unconstitutional on Commerce Clause grounds in suit brought by eight States for "injunctive relief against Louisiana or its agents collecting the Tax * * * as well as a refund of taxes already collected"). It is ironic for Montana to argue that federal law cannot afford the United States and the Tribe the remedy of disgorgement of taxes obtained in derogation of federally guaranteed rights when Montana's own common law permits such an action between Montana's political subdivisions.[22]

3. Even putting to one side the question of common-law actions in quasi-contract, the United States and the Tribe also requested that the proceeds of the unlawful tax be restored to the Tribe through the doctrine of constructive trust. Pet. Br. 25 (acknowledging that constructive trust was sought). A constructive trust has never required the implication of a contract between the parties. Instead, a "constructive trust" is an equitable remedy that "is imposed upon [the defendant] in order to prevent his unjust enrichment. To prevent such unjust enrichment an equitable duty to convey the property to [the plaintiff] is imposed upon him." Restatement of Restitution § 160, cmt. c, at 642-643 (1937); see also *id.* § 160, at 640-641 ("Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that

[22] For that reason, petitioners' reliance (Br. 29) on the absence of privity between the United States and the State in *California* is misplaced. There, the United States was seeking relief not in its sovereign capacity, but rather simply by virtue of its contractual arrangements with a private party. 507 U.S. at 757. In the present case, the United States and the Tribe are seeking relief from unlawful coal taxes that were found to have "impermissibly eroded the Tribe's sovereign authority." Pet. App. 6. As shown above, the courts do not impose a privity requirement in disputes between sovereigns, *qua* sovereigns, over tax funds.

he would be unjustly enriched if he were permitted to retain it, a constructive trust arises."); see also pp. 38-40, *infra* (explaining origins of constructive trusts in equity).

For that reason, neither the Court's refusal to imply a contract in *California*, nor the purported requirement of privity upon which that refusal supposedly was based, precludes the relief ordered by the court below. Instead, that relief is justified by the doctrine of constructive trust, which does not rest on an implied contract, has no privity requirement, and was not even addressed by the Court in *California*.

Petitioners maintain—in a single footnote (Br. 36 n.6) —that a constructive trust theory cannot justify the decision below. But petitioners never raised those arguments before the Ninth Circuit, either in their brief on the merits or their petition for rehearing. Nor are their arguments included within the question presented, which does not address whether the Tribe could obtain the remedy of a constructive trust. Instead, it asks only whether "an Indian tribe * * * [may] recover in quasi-contract." Pet. i. It is this Court's settled practice not to address in the first instance arguments that are outside the scope of the question presented and that were not presented to the courts below. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533-534 (1992); *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 & n.2 (1989); *Salinas* v. *United States*, No. 96-738 (Dec. 2, 1997), slip op. 8. Application of that rule is especially appropriate here, because petitioners' contentions depend on factual issues that the lower courts are best equipped to resolve in the first instance.[23]

[23] Petitioners' claims are, in any event, without merit. Petitioners first argue (Br. 36 n.6) that the request for a constructive trust is irrelevant because a constructive trust "is properly viewed as a form of

C. The Restitutionary Remedy Ordered By The Court Of Appeals In This Case Was Within The Equitable Powers Of The Federal Courts

Although it is clear that federal courts have inherent power to impose an equitable remedy for a violation of

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remedy, not a substantive cause of action." Here, however, there is a substantive cause of action, as this Court recognized in *Minnesota*, 270 U.S. at 194; *Colville*, 447 U.S. at 134; and *Moe*, 425 U.S. at 468 n.7. See pp. 19-22, *supra*. The question is whether the constructive trust remedy is available in that cause of action; petitioners offer no reason why it should not be available.

Petitioners also argue that, if a constructive trust were imposed, the recovery here would be excessive: A constructive trust, they contend, can be applied only to specific property (a traceable corpus), and cannot be applied to funds that have been dissipated. 1 Dobbs, *supra*, § 4.3(2), at 591; 2 Dobbs, *supra*, § 6.1(3), at 12-14 (funds otherwise held in constructive trust that are dissipated and not traceable cease to be recoverable). Much of the unlawfully collected taxes, petitioners maintain (Br. 36 n.6), has already been spent. That argument is outside the question presented not only because it does not relate to "quasi-contract," but also because it goes to the proper measure of relief, not whether there is any relief available at all. See Pet. i (asking only whether the Tribe can recover, not whether the recovery here was in an appropriate amount). In any event, petitioners concede that at least $13 million (plus accumulated interest) on their unlawful gains remain in the constitutional trust fund, and their contention that the remainder was "dissipated" is best reviewed by the lower courts in the first instance.

Finally, petitioners argue (Br. 36-37 n.6) that a plaintiff seeking a constructive trust must make out the elements of a cause of action in assumpsit. But the authorities petitioners cite at no point indicate that there is a privity requirement in order for a constructive trust to exist, and petitioners cite no case law to that effect. To the contrary, like all equitable remedies, constructive trusts are designed to be applied flexibly and tailored to situations in which a count for assumpsit may or may not lie. Indeed, this Court imposed a constructive trust in *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam), without any discussion of the elements of a claim in assumpsit.

federal rights where a federal cause of action exists, petitioners argue that the remedy imposed here was not equitable in nature. In particular, petitioners argue that, because quasi-contract actions sound in law rather than equity, restitution cannot be justified as equitable relief for the violation of the Tribe's federally guaranteed rights. See Pet. Br. 26 (citing 1 G. Palmer, *The Law of Restitution* § 1.2, at 9 (1978), for the principle that "quasi-contract" is "an action at law"); *id.* at 36 ("quasi-contract was a form of action that developed at *law*, not in equity, to remedy a breach of a judicially implied contract"). That argument is not only contrary to petitioners' position below—where they acknowledged that both "quasi-contractual obligation" and "constructive trust" are "forms of restitution [that] are viewed as equitable in nature," J.A. 340—but also irrelevant and incorrect.

1. The argument is irrelevant because it once again confuses cause of action with remedy. Whether a cause of action for "quasi-contract" or "assumpsit" sounds in law or equity, the United States and the Tribe do not need to rely on that particular common-law cause of action because they have a federal cause of action based on petitioners' unlawful intrusion into their federally guaranteed rights. See pp. 19-22, *supra*. Having stated a claim for and prevailed on that cause of action, they are entitled to any appropriate relief, including disgorgement of petitioners' unlawful gains. See pp. 22-25, *supra*. And there can be no dispute that the relief for a violation of federal law can include a requirement that the defendant disgorge his ill-gotten gains. See, *e.g.*, *Porter*, 328 U.S. at 399 (holding that "a decree compelling one to disgorge profits, rents or property acquired in violation of [federal law] may pro-

perly be entered by a District Court" under its "equity jurisdiction").[24]

2. Petitioners' argument is incorrect because their assertion that restitution is necessarily a form of "legal" rather than "equitable" relief is unsound. This Court not only has recognized that "restitution" is "traditionally viewed as 'equitable'," *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255 (1993); see *id.* at 263 (White, J., dissenting) (referring to "restitution" as one of "the 'traditional' equitable remedies"), but repeatedly has upheld restitutionary orders as such. See, *e.g.*, *Porter*, 328 U.S. at 399 (upholding disgorgement as within a federal court's "equity jurisdiction"); *Mitchell*, 361 U.S. at 291-292 (referring to "the historic power of equity to provide complete relief").[25]

History supports this Court's view (and petitioners' concession) that restitution does constitute "equitable" relief. Indeed, the commentators agree that restitution has both legal and equitable roots. See 1 Dobbs, *supra*, § 2.1(2), at 62 ("both law courts and equity courts made restitutionary awards"); *id.* § 4.3(1), at 586-687 (detailing equity's contribution); Davis, *Restitution: Concept and Terms*, 19 Hastings L.J. 1167, 1167 (1968) ("The roots of

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[24] For this reason too, it is not at all clear whether characterizing the relief as "legal" or "equitable" makes a difference. Once a federal cause of action is stated, federal courts have full power and authority to enter any appropriate relief, legal or equitable, to remedy the violation, unless Congress expressly provides otherwise. See pp. 22-25, *supra*.

[25] Amici's attempt to distinguish *Porter* on the ground that it merely restored the status quo ante (NCSL Amici Br. 14-15) is without merit. It is a fundamental principle that disgorgement is measured not by the plaintiff's loss but rather by the defendant's gain, and it is thus well recognized that it restores *the defendant* to status quo ante, although it may not have precisely that effect on the plaintiff. See 1 Dobbs, *supra*, § 4.1(1), at 550-551; see also pp. 48-49, *infra*, and sources cited therein.

restitution can be traced to some of the earliest common law proceedings in debt and account and, due to procedural difficulties in these actions, to some of the first bills in chancery.") (footnotes omitted).

Indeed, while the cause of action for assumpsit (or quasi-contract)—the cause of action upon which petitioners almost exclusively focus—may have developed at common law, courts of equity offered comparable relief *before* that innovative cause of action was adopted. In fact, assumpsit was developed by the common law courts in *response* to the popularity of the equitable remedies available in the courts of chancery. As one commentator explains, it was "[b]ecause of the popularity of seeking relief in chancery" that "the jealous common law courts developed the action in assumpsit." Davis, 19 Hastings L.J. at 1167; accord Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 14 (1888); see also 1 Dobbs, *supra*, § 4.3(1), at 588-589 (characterizing constructive trust and other remedies as "largely 'equitable'").

In any event, it is virtually undisputed that the doctrine of constructive trust comes exclusively from the equity side of the courts. While law courts were often barred from affording relief where the defendant held legal title or the claim could not be wedged into a common-law form, courts of equity were not so limited. As Professor Dobbs explains (1 Dobbs, *supra*, § 4.3(1), at 587):

> Equity's moral interest in conscience was coupled with an enormous power the law courts did not have, to act against the person rather than against the property. [Rather than ordering damages as the law courts would], [e]quity courts would express the defendant's liability to reconvey by calling him a constructive trustee.

Once it called the defendant a "constructive trustee," the equity court would simply enter an in personam order requiring the trustee to transfer title and possession of the disputed property or funds to the constructive beneficiary. *Ibid.*; 1 Palmer, *supra*, § 1.3, at 9-16 (recognizing constructive trust as having its origins in equity and as affording "relief in equity").[25]

D. A Disgorgement Remedy Is Consistent With Equitable Principles and Federalism Considerations

Petitioners' broad request for immunity from restitution based on the nature of restitution or the power of the federal courts to impose such a remedy must fail, for the reasons already stated. Petitioners offer, however, a series of case-specific reasons why, in their view, such a remedy is inappropriate here. But petitioners fail to come to terms with the most important equitable facts in this case—that they "levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal," with full knowledge that the taxes "were potentially preempted," and with the expectation that "court decreed settlements" like the one entered in this case "would be required to resolve their legality." Pet. App. 9, 12. In any event, petitioners' various arguments are without merit.

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[25] Petitioners also argue that, if equitable, restitution should not be permitted where there is an adequate remedy in damages. Pet. Br. 37 ("The availability of a legal remedy is dispositive."). But it is settled law that "[t]he availability of restitution is not dependent upon inadequacy of the alternative remedy." 1 Palmer, *supra*, § 1.6, at 33. In any event, petitioners advert to no finding that a damages remedy is available, and, if available, adequate in this case. Indeed, their amici assert that legal relief is not only inadequate but unavailable. NCSL Amici Br. 10-11 (it should have been "obvious to the Tribe from the start that there was no adequate remedy at law and that its only remedy was to seek to enjoin the State from collecting the tax").

1. Petitioners first contend (Br. 37-40) that federal courts ought not be permitted standardless discretion to afford restitutionary relief. What the Ninth Circuit applied here, however, was not standardless discretion. Instead, the Ninth Circuit applied the well-settled equitable principle that, when an injunction has been entered to prohibit the unlawful acquisition of property, a second injunctive decree may be entered to require the wrongdoer to disgorge any unlawfully obtained profits. As this Court explained a half-century ago in *Porter*, 328 U.S. at 398-399:

> It is readily apparent * * * that a decree compelling one to disgorge profits, rents or property acquired in violation of [the federal statute] may properly be entered by a District Court once its equity jurisdiction has been invoked[.] * * * Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.

Petitioners' contrary argument is based on the unwarranted assertion that no equitable relief should be available unless the United States and the Tribe demonstrate that they are entitled to relief under quasi-contract principles. Pet. Br. 40 (federal court remedial powers for violation of federal law must be based on the "rich history of quasi-contract law"). The United States and the Tribe do not have to demonstrate that they have a cause of action in quasi-contract because they have a cause of action under federal law for Montana's unlawful interference with the Tribe's federally guaranteed rights. See pp. 19-

22, *supra*.[27] Petitioners do not cite a single case holding that a plaintiff cannot obtain equitable relief, by means of constructive trust or disgorgement, for a violation of federal law unless the plaintiff can make out the elements of a common-law cause of action in assumpsit.[28] And given the historical origins of those equitable remedies, any such

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[27] Both have, moreover, demonstrated that they are entitled to prevail under the theory of assumpsit and the doctrine of constructive trust. See pp. 31-36, *supra*.

[28] The cases cited by petitioners in no way suggest that equitable relief is available only where a plaintiff can prevail on a common-law cause of action for assumpsit. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 63 (1975) (see Pet. Br. 38), held that a plaintiff needs to establish the "traditional prerequisites" for preliminary equitable relief, in that case a showing of irreparable harm so as to justify a preliminary injunction. *Rondeau* says nothing about the need to prevail on a common-law cause of action in order to obtain an equitable remedy for a violation of federal law. Similarly, in *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940) (see Pet. Br. 39), the Court held that equitable relief is available under 15 U.S.C. 77v, provided that the plaintiff's "bill states a cause of action when tested by the customary rules governing suits of such character." 311 U.S. at 288. Contrary to petitioners' contention, the remaining discussion says nothing about meeting the requirements for recovery under "quasi-contract" or any other common-law legal action. To the contrary, it simply notes that the plaintiffs had alleged sufficient facts to state a claim under Section 12(2) of the Securities Act of 1933, 15 U.S.C. 77*l*(2) (1952) (now codified at 15 U.S.C. 77*l*(a)(2) (Supp. I 1995)). Nor does *Lonchar* v. *Thomas*, 517 U.S. 314 (1996) (Pet. Br. 39), assist petitioners. There, this Court declined to allow federal courts to dismiss habeas petitions for delay based on *ad hoc* equitable principles, because the habeas statute dealt with the issue of delay directly and allowed dismissal only where delay prejudiced the respondent. 517 U.S. at 326-329. Here, in contrast, the court below did not award a remedy without reference to the requirements for relief. To the contrary, it made certain a cause of action existed and that the United States and the Tribe had prevailed before entering the traditional equitable remedy of disgorgement of petitioners' unlawful gains.

requirement would be wholly inappropriate. The doctrine of constructive trust and the remaining equitable restitutionary remedies were developed to provide a remedy precisely in those situations in which the plaintiff, despite a sound claim of equitable entitlement, could *not* prove his cause of action at law.[29]

Reference to state law confirms the appropriateness of granting such relief here. While state law will not be permitted to "destroy the federal right which is to be vindicated," federal courts can and sometimes do refer to state law remedial frameworks when that law, although not "the source of the right," is "not deemed inconsistent with federal policy." *Board of County Comm'rs*, 308 U.S. at 350, 352. Here, it is undisputed that Montana law would afford one county the remedy of restitution if another county obtained tax funds in violation of the first county's sovereign rights, even absent privity between them. See *Valley County*, 97 P.2d at 366; see also pp. 32-34, *supra*

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[29] Professor Dobbs explains (1 Dobbs, *supra*, § 4.3(1), at 586-587):

> In property cases, a major limiting factor on restitution at law [as opposed to in equity] was the conception of formal title, beyond which courts could not examine. The ejectment claim was a restitutionary device, but not one that helped unless the plaintiff had good title at law. Equities in the plaintiff's favor were of no help at all. The plaintiff who was led by the defendant's fraud to convey his land had no remedy in ejectment because he had no title. * * *
>
> Equity's advantage in fashioning restitutionary remedies was exactly at this point: equity had developed a method of sidestepping title problems. Equity's theory was that it did not decide title but acted *in personam*. It did not act on title or property but upon the person of the defendant, compelling him to follow good conscience rather than good title. If the defendant had secured legal title to Blackacre by unconscionable acts, the equity courts could simply order the defendant to reconvey Blackacre to the plaintiff.

(discussing *Valley County*); Pet. App. 80. There is no good reason why federal courts should not be able to offer the same remedy here simply because it is the Tribe's federally guaranteed sovereign rights, and not the state-law rights of a Montana county, that are at stake.[30]

2. Notwithstanding their knowing intrusion into the Tribe's federally guaranteed rights, petitioners claim (Br. 41-43) that the remedy imposed here is inconsistent with federalism principles. It is difficult to see how petitioners can invoke federalism principles to defeat a remedy that Montana courts regularly provide in suits between Montana counties. See pp. 32-34, 43-44, *supra*. But even setting that defect aside, petitioners seek not respect but rather broad immunity from liability for intruding upon the rights of Indian Tribes—a subject that is the "exclusive province" of federal law under the framework of federalism adopted by the Framers. *County of Oneida*, 470 U.S. at 224. Petitioners do not ask that Montana's state taxation scheme be permitted to remedy the federal injury to the Tribe and the United States without judicial interference. They concede that those processes will afford the United States and the Tribe no relief at all. See Pet. Br. 30 n.5; see also NCSL Amici Br. 10-11.

For that reason, petitioners' reliance (Br. 41-43) on *National Private Truck Council, Inc.* v. *Oklahoma Tax*

[30] Indeed, the additional factors cited by the Court in *Board of County Commissioners* as weighing against the provision of the remedy at issue there—interest—weighs in favor of a fully restitutionary remedy here. Not only does Montana allow its counties to recover taxes from each other directly, contrast 308 U.S. at 352 (State did not provide interest on refunds to its taxpayers), but Montana had actual knowledge of the potential invalidity of its taxes from the outset, and imposed them nonetheless, contrast 308 U.S. at 352-353 (relying on the fact that Kansas acted in good faith and the United States delayed notifying Kansas of the claim for eight years).

Commission, 515 U.S. 582, 586 (1995), and *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 111 (1981), is misplaced. In those cases, the Court held that 42 U.S.C. 1983 does not authorize the bringing of federal damage and injunctive claims by taxpayers when taxpayers *do* have access to full, fair, and effective remedies for their federal rights through state administrative processes.[31] Petitioners surely cannot invoke the same principle of "respect" for state administrative tax processes where those processes provide the United States and the Tribe with no redress for Montana's violation of federal law. Any such rule for the federal courts would not only undermine the federal trust responsibilities to the Indians, but would also be inconsistent with the Supremacy Clause and fundamental notions of due process. See *Board of County Comm'rs*, 308 U.S. at 350-351 ("Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated * * *. The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. Nor may the right to recover taxes illegally collected from Indians be unduly circumscribed by state law.") (citations omitted); *West Virginia* v. *United States*, 479 U.S. 305, 312 (1987) (following *Board of County Commissioners* in declaring that, "while courts must show 'solicitude for state interests * * *,' these interests may be overridden to avoid injury to 'clear and substantial interests of the

[31] See *National Private Truck Council*, 515 U.S. at 585-586 (addressing availability of relief "under § 1983 when adequate remedies exist under state law"); *id.* at 588, 591; *Fair Assessment*, 454 U.S. at 116 (taxpayers may not use Section 1983 to challenge validity of state taxes and must instead use state remedies, "provided of course that those remedies are plain, adequate, and complete").

National Government'") (quoting *United States* v. *Yazell*, 382 U.S. 341, 352 (1966)).

Finally, contrary to petitioners' unsubstantiated assertions that providing equitable relief would be "draconian" (Pet Br. 43), the effect of the Ninth Circuit's order is quite limited. Not only is such relief available only to sovereign parties like the United States and the Tribe that do not have adequate state remedies for their federal rights, but it is bounded by the doctrine of state sovereign immunity. Unless a State's immunity is waived or validly abrogated, a suit like this one will be available only where the United States itself sues to invoke the aid of federal courts in removing state "obstacles to the fulfillment of its obligations" to the Indian Tribes. *Minnesota*, 270 U.S. at 194; contrast *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997). Given the magnitude and circumstances of the adoption of the state taxes that this Court has already held to be invalid in this very case, it could not plausibly be suggested that the United States has taken an unrestrained approach here. There likewise is no evidence that the United States has abused that power in the past, and there is no reason to believe it will not exercise it responsibly in the future.

3. Petitioners' final argument is one of mitigation. Immunity from taxation affecting tribal property is a complex area of law, they assert, and the outcome was far from certain in this case. See Pet. Br. 43-48; NCSL Amici Br. 11-12, 18-21. Even assuming that such a naked plea for rebalancing of the equities can be considered within the question presented—which asks only about the availability of relief, not the correctness of affording it here—the argument is without merit.

Despite petitioners' lengthy discussion (Br. 43-48) regarding the complexity of Indian taxation issues, they nowhere dispute that the Montana Legislature, at the time

it enacted the severance and gross proceeds taxes, knew that those taxes potentially infringed upon the federally guaranteed rights of the Tribe and were therefore of questionable legality. The record not only shows that "Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal," but also that Montana "was aware that the taxes were potentially preempted and expected 'court decreed settlements' would be required to resolve their legality." Pet. App. 9, 12. Surely petitioners cannot rest on the supposed complexity of Indian taxation law as a basis for resisting equitable relief when they imposed their taxes despite actual knowledge of their potential infirmity. To the contrary, that knowledge weighs heavily in favor of affording full relief. The contrary rule petitioners promote—that disgorgement not be available—would invite a cavalier attitude toward federally guaranteed Indian rights. As this Court has observed, where parties "face[] only the prospect of an injunctive order, they * * * have little incentive to shun practices of dubious legality." *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975).

For the same reason, the contention of petitioners' amici that prospective relief provides appropriate deterrence is without merit. NCSL Amici Br. 10-12. Such a rule would give defendants every incentive to delay. Here, for example, petitioners strenuously opposed the preliminary relief ordered in 1983, arguing that the money "is recorded, traceable and refundable by the State," J.A. 191, and that preliminary relief was unnecessary because "the State is fully capable of meeting any obligations which might ultimately arise as the result of any proper judgment," J.A. 199. Had they succeeded in opposing that relief, they presumably would argue today that they must be permitted to keep all of the unlawful sums they exacted

not merely up to 1982, but to date. It is precisely that sort of unjust enrichment that remedial orders such as disgorgement are designed to prevent.

In fact, petitioners' theory not only would leave them unjustly enriched, but it also would leave the Tribe without any remedy for its injury. But for Montana's illegal taxes, the Tribe would have received substantially greater benefits from its coal, whether in the form of royalties or in the form of the severance tax it had unsuccessfully attempted to assess against Westmoreland. Pet. App. 11-12. "Westmoreland was willing to pay coal taxes to the Tribe as early as 1976," but refused to do so because it would have had to pay petitioners' unlawful (and exorbitant) taxes at the same time. *Id.* at 12. These conclusions are amply supported not only by the record,[32] but also by subsequent events. Westmoreland in fact actually agreed to pay a tribal tax equal to the one it paid to petitioners (in 1982)—so long as it did not have to pay both petitioners' tax and the Tribe's—and consistently has paid that tax since petitioners' was invalidated.[33]

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[32] See, *e.g.*, Pet. App. 11-12 (detailing evidence supporting conclusion that Montana's coal taxes deprived Tribe of revenue); J.A. 87 (when Tribe sought to renegotiate its lease with Westmoreland in 1976, Westmoreland took the position that "any additional payment to the Tribe would have to be in lieu of, rather than in addition to, the state tax"); J.A. 286 (because the coal was part of the Reservation, "[a]t all relevant times, the Crow Tribe has had a valid coal mining tax applicable to the mining by Westmoreland of its coal even though Westmoreland's mining activities were conducted on the Ceded Strip")

[33] Petitioners' fact-bound challenge to that conclusion does not warrant this Court's plenary review, and it is without merit in any event. While petitioners appear to rely on the Interior Department's purported disapproval of the Tribe's tax as applied to the ceded strip, petitioners overlook the fact that Westmoreland opposed approval of the Tribe's tax—and thereby caused the Department to withhold approval—precisely to avoid concurrent taxation. Pet. App. 31. In the absence of Montana's preexisting taxes, it is unlikely that Westmoreland would have resisted the Tribe's severance tax. More important still, the district court determined that the Tribe's tax in fact had been approved by the Department, and that the purported disapproval with respect to the ceded strip was without effect because the Department had proceeded from the mistaken assumption that the mineral estate under the surface of the ceded strip was not part of the Reservation, when in fact it was. J.A. 286; see pp. 6-7, *supra*. Petitioners did not challenge that ruling in the court of appeals, and they do not challenge it here.

In any event, petitioners' complaint that the amount of the restitutionary award may to some degree exceed the actual damage incurred by the Tribe is entirely beside the point. One of the acknowledged characteristics of restitution is that the recovery by the plaintiff may on occasion exceed the damage the plaintiff incurred, and that has never been thought to bar its imposition. See 1 Dobbs, *supra*, § 4.1(1), at 555 ("Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss."); see also *id.* at 551; *id.* § 4.3(2), at 592. That principle simply reflects the considered judgment, borne of history and experience, that the defendant ought not be permitted to be unjustly enriched by his misdeed, even if that is accomplished by transferring all of his profits to the plaintiff. Petitioners offer no good reason why the same principle should not be applied in remedying their knowing and unlawful efforts to supplant the Tribe as the rightful recipient of the economic value realized from exploitation of the Tribe's most significant Reservation resource.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

CROW TRIBE OF INDIANS; and
UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondents attempt in this Court to mix and match rights and remedies in a way that cannot withstand scrutiny. To be sure, they prevailed on a claim that the Montana taxes are preempted. The remedies for so prevailing were prospective relief and, at most, any consequential damages to respondent Crow Tribe caused by the taxes' application. But respondents already have received prospective relief, and, despite many years of litigation, they either despaired of proving or were unable to show any appreciable actual damages attributable to the taxes – a conclusion reflected in the record not only with respect to ceded-strip production by Westmoreland Resources, Inc. but also with respect to the failure of Shell Oil Company to develop the Youngs Creek Project.

It is thus not surprising that respondents opted to seek another form of recovery by shifting their focus to the monies obtained by petitioners from Westmoreland. The problem became how to lay claim to those funds. The answer was an amended complaint for monies had and received – a quasi-contract cause of action. Whatever plausibility such a claim may have had when initially advanced by respondents in 1989 and 1990 nonetheless was lost after this Court's decision in *United States v. California*, 507 U.S. 746 (1993).

Because the quasi-contract claim is precluded, respondents now urge this Court to provide relief, which they christen "disgorgement," identical to that otherwise available under their all-but-abandoned quasi-contract claim as a remedial adjunct to the successful preemption claim. However, whether the issue is deemed to be the existence of a "cause of action" in quasi-contract (as petitioners urge in light of respondents' over-eight-year litigation strategy) or the "appropriate[ness]" of the "disgorgement" remedy as a part of the preemption claim (as respondents do presently) makes no difference to the outcome here; they are simply different characterizations of the same analytical inquiry. That inquiry leads to only

two conclusions: The relief awarded by the Ninth Circuit cannot be reconciled with the decisions of this Court or, for that matter, those of any other court and, if sustained, promises to usher in an entirely new and disruptive species of tax-recovery litigation.

ARGUMENT

I. *CALIFORNIA* GOVERNS THIS CASE.

Respondents recognize that this Court held in *California* that federal common law generally prevents a nontaxpayer from recovering in quasi-contract taxes paid by a third party. Brief for Respondent Crow Tribe ("Crow Br.") at 45-46; Brief for United States ("U.S. Br.") at 26-28. Respondents nonetheless advance three principal arguments as to why this case does not prohibit the Tribe from collecting taxes paid by Westmoreland. All are specious.

First, respondents' attempts to shrug off *California* as merely a "cause of action" case cannot withstand review. The core of respondents' position is this Court's statement in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992), that "the question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." The term "cause of action" nevertheless has meanings other than that assigned by respondents. In *Davis v. Passman*, 442 U.S. 228, 273 (1979), this Court accordingly observed that a "cause of action" has been used by "courts and commentators . . . in the traditional sense established by the Codes to refer roughly to the alleged violation of 'recognized legal rights' upon which a litigant bases his claim for relief." *See generally* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216, at 148 (2d ed. 1990); William Witz Blume, *The Scope of a Civil Action*, 42 Mich. L. Rev. 257, 261 (1943).

This is precisely the formulation that applies to the use of the term "cause of action" in *California*. There, this Court held that the United States had not stated a claim lying in quasi-contract to recover taxes it had not paid. 507 U.S. at 756 ("[w]ithout an implied contract, an action for money had and received will not lie against the State"). *California* thus embodies a substantive determination of the standards by which liability in quasi-contract to nontaxpayers must be measured and prescribes the elements that condition availability of the precise *remedy* respondents seek (return of monies had and received) by virtue of the state taxes' preemption. To say, as the United States does, that it "has no bearing" on the claim here (U.S. Br. at 27) misses this critical point, since *California* prescribes the elements which condition availability of the very *remedy* respondents seek by virtue of the state taxes' preemption.

Second, respondents contend that in *California* the United States "was seeking relief not in its sovereign capacity, but rather simply by virtue of its contractual arrangements with a private party." U.S. Br. at 27 n.16; *see also* Crow Br. at 44-45. This contention cannot be squared with the Government's request in *California* for quasi-contract relief on the ground that "the disbursement of *federal funds* [was] involved." *California*, 507 U.S. at 752 (emphasis added). The requested relief was rejected not because the quasi-contract claim was being asserted by the United States in other than its "sovereign" capacity, but because no contract-at-law could be implied between California and the United States under the facts.

Third, respondents assert that *California*, unlike this case, involved a violation of state law. As petitioners previously demonstrated (Brief for Petitioners ("Pet'rs Br.") at 34-35), that was not the basis for *California*'s quasi-contract holding. This Court accorded no significance to the state-law basis of the United States' challenge to the tax but, rather, rejected the quasi-contract

claim on the ground that "California's demand that [the taxpayer] pay what California believed to be a lawful debt does not make California legally responsible for the Government's indemnification of [the taxpayer]." 507 U.S. at 756.[1]

II. EVEN IF *CALIFORNIA* DOES NOT PRECLUDE RESPONDENTS' CLAIM AS A MATTER OF LAW, THE JUDGMENT BELOW STILL MUST BE REVERSED.

Even were *California* not wholly dispositive of the claim to Westmoreland's taxes, respondents are still not entitled to the relief ordered by the court of appeals. Although contending that they have a cause of action which arises from the finding in *Crow II*[2] that Montana's coal taxes were preempted, respondents themselves recognize that the fact of preemption is not alone sufficient to entitle them to Westmoreland's state tax payments. Respondents accordingly concede that they must show that such a remedy is "*appropriate*." Crow Br. at 42; U.S. Br. at 22, 30. This concession is controlling.

A. Common-Law Standards Govern the Exercise of Federal Remedial Rights.

Respondents assert that federal courts have nearly limitless power to fashion relief but offer no real

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[1] The United States' related assertion that "violations of state law can give rise only to state causes of action" (U.S. Br. at 29 n.18) also fails to account for the fact that this Court's analysis in *California* was grounded in principles derived from decisional authority – *Gaines v. Miller*, 111 U.S. 395 (1884), and *Bayne v. United States*, 93 U.S. 642 (1877) – which did not involve state law-based claims.

[2] *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987) (Pet. App. 88), *aff'd mem.*, 484 U.S. 997 (1988).

guidance for the exercise of that power. Certainly none of the decisions they cite supports the sort of restitutionary relief sought or holds that common-law principles governing the appropriateness of such relief should be discarded. It is instead well established that, in determining whether a remedy is appropriate, courts look to the common law and established legal principles. *See* Pet'rs Br. at 35-40.

The series of allotted-land property tax cases involving invalidation of state or local government assessments relied upon by the United States were brought by either the actual Indian taxpayer or the United States on the taxpayer's behalf to have taxes declared invalid and, in some instances, to recover taxes previously paid *by the taxpayer*. U.S. Br. at 23. These decisions therefore fall squarely within the traditional role assigned to claims for money had and received. *California*, 507 U.S. at 751. The other Indian-law decisions advanced by respondents – *United States v. Minnesota*, 270 U.S. 181 (1926), and *Heckman v. United States*, 224 U.S. 413 (1912) – were suits by the United States to set aside conveyances of tribal land allegedly made in violation of federal statutes and offer no guidance on the scope of a court's authority to award Westmoreland state tax payments to respondents simply by virtue of the preemption determination.

Respondents' heavy emphasis on *Maryland v. Louisiana*, 451 U.S. 725 (1981), is likewise misplaced. Crow Br. at 37-38; U.S. Br. at 33-34. There, several States filed an original proceeding in this Court challenging the validity of a Louisiana tax on oil and natural gas. Refunds also were sought as to the Louisiana taxes that the complainant States themselves had paid and the taxes paid by the States' consumers on whose behalf each State sued in its

parens patriae capacity. *Id.* at 736-39.[3] *Maryland* therefore offers no support for the notion that a State or other sovereign can recover for its *own* benefit taxes paid by another.[4]

Revealingly, respondents relegate to footnote treatment those cases that most directly address the issue of a federal court's power to fashion relief for a violation of federal law. Crow Br. at 42 n.29; U.S. Br. at 42 n.28. Respondents dismiss petitioners' reliance on these cases as reflecting "confusion regarding the difference between a federal cause of action and the relief afforded under it." Crow Br. at 43 n.29; *accord* U.S. Br. at 42 n.28. A careful review of these cases, however, makes plain that it is

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[3] Indeed, *Maryland* is quite problematic from respondents' perspective to the extent it recognized the petitioner States' parens patriae standing for the purpose of recovering taxes on behalf of their consumer residents. There, the legal incidence of the Louisiana tax fell on the individual consumers who could "not be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small" – i.e., the incidence of the tax did not "fall on a small group of citizens who are likely to challenge the Tax directly." 451 U.S. at 739. The same cannot be said here. *Commonwealth Edison Co. v. Montana*, 615 P.2d 847 (Mont. 1980), *aff'd*, 453 U.S. 609 (1981).

[4] The other "disgorgement" decisions from this Court upon which respondents rely are inapposite for the same reason. *Snepp v. United States*, 444 U.S. 507, 514-16 (1980), held that where damage to national security from breach of contract was unquantifiable, a constructive trust would be imposed on proceeds from a book whose publication constituted breach. This Court's decision in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), concluded only that a federal court had authority to award amounts paid in excess of rent-control limits to the administrator of the Office of Price Administration who sued to recover those amounts on behalf of the overcharged tenants.

respondents who are "confused" regarding the scope of a federal court's remedial powers.

In *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), the Court started with the premise that the defendant had violated the Williams Act. Nonetheless, the Court concluded that the plaintiff was *not* entitled to the relief it sought because the plaintiff had failed to satisfy the "traditional equitable principles" necessary for the requested relief. *Id.* at 61. The Court reached the same conclusion 30 years earlier in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), where the defendant admitted it had violated a federal statute but nevertheless argued the injunctive relief was inappropriate. This Court agreed, declining to grant the United States' requested remedy because the relief would mark "a major departure from . . . tradition." *Id.* at 329-30.

Deckert v. Independent Shares Corp., 311 U.S. 282 (1940), further supports the rule that federal courts ordinarily must tailor remedies to established common-law principles. This Court thus summarized the core of *Deckert*'s holding in *Rondeau* in the following manner: "[T]he conclusion that a private litigant could maintain an action for violation of the 1933 [Securities] Act means no more than that traditional remedies were available to redress any harm which he may have suffered; *it provided no basis for dispensing with the showing required to obtain relief.*" 422 U.S. at 63 (emphasis added). Put otherwise, the mere existence of a cause of action to enforce a federal right does not dispense with the obligation to justify any relief sought or awarded by reference to "traditional," or common-law, standards.

No less remarkable, lastly, is the Tribe's attempt to embrace and simultaneously to distinguish *Lonchar v. Thomas*, 116 S. Ct. 1293 (1996). While conceding the Court held there that "courts in equity must be governed by rules and precedents no less than the courts of law" (*id.* at 1298), the Tribe asserts, citing *Albemarle Paper Co. v.*

Moody, 422 U.S. 405 (1975), that those "rules and precedents" do not include established common-law standards. Crow Br. at 43 n.29. *Albemarle* says nothing of the sort. To the contrary, this Court in *Albemarle* stated, as quoted earlier in the Tribe's own brief (Crow Br. at 28-29), that "when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.'" 422 U.S. at 417.

B. The Award Ordered by the Ninth Circuit is Illogical and Contrary to Settled Common-Law Standards.

Viewed in light of established common-law principles, the relief awarded by the Ninth Circuit is plainly inappropriate. The Ninth Circuit, at bottom, ruled that because it had previously decided in *Crow II* that the Tribe had suffered at least "some" harm from Montana's preempted coal taxes, the Tribe was, as a matter of law, entitled to the full amount of the taxes paid by Westmoreland. While the prospective relief already awarded to respondents is common (*see Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 113-14 (1989) (Kennedy, J., dissenting)), the retrospective relief sought by respondents is unprecedented. The reasons for the absence of such authority are not difficult to fathom.

Most fundamentally, the judgment below is irreconcilable with common-law privity requirements – i.e., the requirement that recovery be limited to the benefit which the plaintiff conferred upon the defendant. *See Pinter v. Dahl*, 486 U.S. 622, 647 n.23 (1988). The Tribe did not pay the taxes at issue and had no contractual obligation with the actual taxpayer, Westmoreland, that would allow it to stand in Westmoreland's shoes. *See* Crow Br. at 24 n.17 (disclaiming subrogation claim). The only party with a claim to the state taxes was Westmoreland, but it forfeited

any claim to the taxes first by failing to initiate state-law tax refund procedures and then through a settlement. J.A. 294; *see* Pet. App. 37 (FOF ¶ 61).

Respondents' answer that common-law quasi-contract principles do not require privity is designed solely to mislead. Crow Br. at 43-46; U.S. Br. at 32-33. They cite in support of this contention several state court cases including, most importantly, *Valley County v. Thomas*, 97 P.2d 345 (Mont. 1939), where one local government entity was permitted to sue another to recover taxes that, by statute, were required to be paid to the plaintiff entity. Those cases do not bear the weight placed upon them, not only because in each instance the state statute required the taxes to be paid to the plaintiff rather than to the defendant but also because a necessary predicate for recovery by the plaintiff was the validity of the tax itself.[5] Such a contention additionally is incompatible with this Court's ruling in *California* that there is no federal common-law cause of action for money had and received for taxes paid by a third party.

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[5] More specifically, in *Valley County* the court was presented with the question of whether automobiles, whose taxable situs lay in the Fort Peck townsite, should have been licensed by Valley rather than McCone County. In resolving this question, it was necessary for the Montana Supreme Court to determine if the townsite, given its location on federal land, had been removed from the state's taxing jurisdiction. After lengthy analysis the court held taxing authority did exist. 97 P.2d at 364. No contention has been, or could be, made that the Tribe was the intended beneficiary of the state tax statutes – a fact the district court in this case recognized in its conclusions of law rejecting respondents' reliance on *Valley County*. Pet. App. 49-50 (COL ¶ 25). The situation here, moreover, is that which would have arisen had the Montana Supreme Court reached an opposite conclusion on the jurisdictional issue: Neither county would have been entitled to the taxes, and only the taxpayers could have sought their recovery.

Beyond failure to satisfy privity requirements, the "scope of the remedy" here is *not* consistent with "the scope of the violation *established*." *Califano v. Yamaski*, 433 U.S. 682, 701 (1979) (emphasis added); *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977) (reversing relief ordered in school desegregation case where "the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court"). The only "violation" shown presently is preemption through operation of the Omnibus Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979) (Supremacy Clause "is not source of any federal rights").[6] That violation has already been remedied by prospective relief prohibiting petitioners from collecting the severance and gross proceeds taxes from Westmoreland. Consequently, the sole unremedied

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[6] In *Crow II* the court of appeals also relied upon interference with tribal sovereignty interests in holding the state taxes preempted. 819 F.2d at 902-03 (Pet. App. 105-07). That aspect of the decision at best is superfluous, since the determination that the taxes were preempted under the Mineral Leasing Act not only made the latter basis for the decision unnecessary but, had preemption not been found under the Act, also would have foreclosed a contrary finding under the tribal self-government principles. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) ("in examining the pre-emptive force of the relevant federal legislation, we are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue"). In any event, this Court's summary affirmance merely approved the court of appeals' judgment, "and no more may be read into [this Court's] action than was essential to sustain that judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 784 (1983). There appears, as well, no reason the Ninth Circuit's judgment would be more defensible even were it predicated exclusively on the sovereignty-infringement ground.

injury the Tribe could have suffered was diminished royalties. Any lost royalties, however, had no logical or, more to the point, record-based relationship to the amount of the taxes paid by Westmoreland. The record in this case instead demonstrates, even in the Ninth Circuit's view, only that "the taxes had at least some negative impact on the coal's marketability." *Crow II*, 819 F.2d at 900 (Pet. App. 100).[7]

C. The United States' Contention That, but for the State Taxes, Westmoreland Would Have Paid Taxes Under the 1976 Tribal Tax Code Ignores the District Court's Contrary Findings.

The United States posits as fact that, but for Westmoreland's opposition to approval of the tribal tax ordinance's application to the ceded strip during the review process before the Department of the Interior, the ordinance would have been approved for such application. U.S. Br. at 48 n.33. Nothing in the record supports this assertion, since nonapproval was premised on the Tribe's constitution, as the district court expressly found, not Westmoreland's unwillingness to be taxed. Pet. App. 36-37 (FOF ¶ 59).

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[7] Respondents rely on footnote 17 in *Cotton Petroleum* and associated text, 490 U.S. at 186 & n.17, for the proposition that the Montana taxes imposed a " 'substantial burden' " on the Tribe. Crow Br. at 29-30; U.S. Br. at 10, 14-15. The Court's analysis in the footnote nonetheless referred only to the Ninth Circuit's conclusion that the taxes had a negative impact on the tribal coal's marketability and to the United States' characterization of the tax rates as " 'extraordinarily high.' " Like the court of appeals' analysis in *Crow II*, this Court's analysis distinguishing the two cases says nothing relevant to the monetary amount of any impact on marketability from the taxes. *See Carey v. Piphus*, 435 U.S. 247, 264 (1978); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

No less unhelpful is respondents' reliance (Crow Br. at 5; U.S. Br. at 48 n.33) on the district court's July 1988 ruling for the proposition that the Department's approval of the tribal tax with respect to the Crow Reservation extended to the ceded strip, notwithstanding the explicitly contrary limitation in the agency's determination (J.A. 281, 286). Respondents fail to mention that the district court clarified in its November 1994 decision the fact that the earlier order related only to the propriety of releasing escrowed funds to the Tribe on the basis of the September 1982 lease amendment and that the order itself addressed the issue of whether Westmoreland had any obligation to the Tribe under the 1976 tax ordinance. Pet. App. 36 (FOF ¶ 59); *see also* Pet. App. 53-54 (COL ¶ 34). Even more important, the district court found that "Westmoreland would not have paid any amounts under the Tribe's 1976 tax code." Pet. App. 36 (FOF ¶ 59). Respondents neither challenge this finding nor suggest any party contended prior to 1988 that the tribal tax had been approved unwittingly by the Department for application to the ceded strip.[8] In sum, Westmoreland did not pay the

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[8] The lack of any contrary suggestion by respondents merely reflects the record, which established unequivocally that the lower courts and the parties recognized the 1976 tribal tax had not been approved for application to the ceded strip. *See Crow Tribe v. Montana*, 650 F.2d 1104, 1115 n.19 (9th Cir. 1981) (Pet. App. 192 n.19), *amended*, 665 F.2d 1390 (1982); *Crow II*, 819 F.2d at 897 (Pet. App. 93); *Crow Tribe v. Montana*, 657 F. Supp. 573, 586-87 (D. Mont. 1985) (Pet. App. 143-44 (FOF ¶ 114)); J.A. 97-98 (second amended complaint, ¶ 30, filed Sept. 29, 1978); J.A. 205-06 (Westmoreland's counterclaim filed Dec. 23, 1982 seeking recovery of all state taxes paid for production prior to Sept. 29, 1982); J.A. 129 (memorandum of Tribe's attorney dated Apr. 8, 1982). Indeed, the parties stipulated in the pretrial order entered by the district court in connection with the 1994 trial that "[i]n February 1977, the Department's Acting Commissioner of Indian Affairs approved the [taxation] code for application within the exterior boundaries of the Reservation but withheld approval with respect to coal production within the ceded strip based on a limitation in the Tribe's Constitution." J.A. 329.

tribal tax because, along with respondents, it believed no obligation existed to do so.

The United States further refers to the court of appeals' statement in *Crow IV* that "Westmoreland was willing to pay coal taxes to the Tribe as early as 1976" (*Crow Tribe v. Montana*, 92 F.3d 826, 830 (9th Cir. 1996) (per curiam) (Pet. App. 12), *amended*, 98 F.3d 1194 (1997)) as support for the contention that, but for the state taxes, the Tribe would have collected taxes under the 1976 taxation code from Westmoreland. U.S. Br. at 48. The Ninth Circuit's conclusion was based on a letter dated March 30, 1976 from Charles E. Brinley, then Westmoreland's president, to the Tribe's chairman. J.A. 87.[9] The significance

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[9] Referring to conversations during *1974 negotiations* that resulted in an amended lease that year, the letter read in part:

> When the amended leases were negotiated between Westmoreland Resources and the Tribe, Westmoreland Resources granted to the Tribe all of the financial advantages Westmoreland Resources could afford both from the point of view of its ability to price your coal competitively and from the point of view of Westmoreland's ability to earn a reasonable return on its investment. During the course of those negotiations, the Westmoreland representatives did express a willingness to pass on to the Tribe any amounts by which the burden of the expected state tax could be reduced by the exercise of whatever governmental powers the Tribe may have had over the ceded strip. That was the only context in which the subject of a tribal tax was discussed and we thought it was understood that the terms of the

accorded Brinley's letter was plainly incorrect since, as the letter itself indicated, the Tribe elected to enter into the 1974 lease amendment that contained no provision of the kind mentioned by Westmoreland during the earlier negotiations. Brinley emphasized, moreover, the need for Westmoreland to pass the tribal tax on to its utility customers – a requirement that could not be satisfied without Department of the Interior approval of the tax for application to ceded-strip production. Thus, as the district court found, even had the state taxes not been in place, Westmoreland would not have paid taxes under the 1976 tribal taxation code. To the extent the court of appeals may have reached a contrary conclusion based on Brinley's letter, it exceeded its appellate authority. *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

III. RESPONDENTS' ALTERNATIVE THEORIES FOR RECOVERY ARE NO MORE PRINCIPLED THAN THE NINTH CIRCUIT'S ANALYSIS.

Respondents make no effort to defend the court of appeals' reasoning but instead offer differing theories to justify their "disgorgement" remedy. The Tribe proposes a three-part inquiry,[10] while the United States tries to

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amended leases were to be the final economic settlement between us.

J.A. 87-88. The letter stated further that the Tribe should consider "reinstituting efforts with the Montana Legislature to gain an appropriate share of the current Montana tax" and that Westmoreland "stands ready to work with you in this regard, provided that there would be no increase in the overall tax and provided that the full cost of any proposed arrangement could be passed along to Westmoreland's customers." J.A. 88.

[10] "[W]hether the disgorgement remedy in favor of the Tribe is appropriate here is governed primarily by the answers to the following questions: (i) will the remedy correct the wrong done to the Tribe?; (ii) will the remedy effectuate the purposes of the laws violated by the State and the County?; and (iii) will the remedy promote compliance with, and deter violations of, the laws that were broken?" Crow Br. at 29.

recast the decision below more to its liking. U.S. Br. at 41 ("[t]he Ninth Circuit applied the well-settled equitable principle that, when an injunction has been entered to prohibit the unlawful acquisition of property, a second injunctive decree may be entered to require the wrongdoer to disgorge any unlawfully obtained profits").[11] Neither theory is consistent with established legal principles governing the scope of a federal court's remedial powers and, accordingly, neither proposed standard provides a principled basis for awarding relief in this, or any, case. Rather, either proposed standard, if credited, would create a new, extraordinarily broad form of recovery in one of the most sensitive areas of the federal-state relationship.

1. The Tribe grounds its remedial test in selected quotations from various decisions including, most importantly, *Albemarle* and *Franklin*. Crow Br. at 27-29. In *Albemarle* and *Franklin*, however, the entitlement to back pay or damages was limited to the individuals who *actually* suffered the claimed loss – not, as here, a third party –

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[11] The United States suggests that common-law constructive trust principles independently support recovery but cites no apposite authority for this proposition. U.S. Br. at 34-35. The difference between quasi-contract recovery and a constructive trust remedy lies in the nature of the judgment sought. *Restatement of Law of Restitution* § 160, cmt. a (1937); 1 George E. Palmer, *Law of Restitution* § 1.3, at 13 (1978); *see also* 1 Dan B. Dobbs, *Law of Remedies* § 4.3(2), at 590, 596 (2d ed. 1993). It is unsurprising, therefore, that neither the parties nor the courts below suggested that relief on constructive trust grounds was appropriate even if quasi-contract relief was not. *See* 92 F.3d at 828-29 (Pet. App. 8-9); Pet. App. 43 (COL ¶ 5)); J.A. 339-42.

and the amount sought was the *actual* monetary value of the loss – not, as here, some fixed amount unrelated to such loss. The remaining decisions relied upon by the Tribe are similarly unsupportive of its theory.[12]

The Tribe's three-part inquiry really consists of two components, since the second factor – "will the remedy effectuate the purpose of the law" – and the third factor – "will the remedy promote compliance with . . . the law[ ]" – are little more than a reformulation of one another, and effectively permit a court to award another's taxes to an aggrieved third party whenever, having found the tax invalid under federal law, it concludes such a remedy will correct the "wrong" done to the complainant. If there is a "wrong," however, the more appropriate remedy lies in using a traditional damages remedy that tailors the amount of the relief to the actual injury done by virtue of the federal law violation. *See Franklin*, 503 U.S. at 75-76. The Tribe's approach, like the Ninth Circuit's, "turns each equity chancellor's conscience" into "a measure of equity" (*Lonchar*, 116 S. Ct. at 1298) without the organizing hand of common-law principles. The Tribe's argument, in short, is simply that it should get the taxes

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[12] *Mills v. Electric Auto-Lite Co.*, 396 U.S. 365 (1970) (whether determination that misstatement or omission in proxy statement is material establishes cause of action under the Securities Exchange Act); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (whether derivative right of action exists under § 14(a) of Securities Exchange Act); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) (whether lost wages arising from discharge in retaliation for exercising rights under Fair Labor Standards Act could be recovered in suit by Secretary of Labor); *Bell v. Hood*, 327 U.S. 678 (1946) (whether district court had jurisdiction over complaint alleging violation of the Fourth and Fifth Amendments and seeking damages); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) (whether district court required to issue injunctive relief once violation of Emergency Price Control Act of 1942 was shown).

because it would be unfair for petitioners not to "disgorge" amounts equal to the taxes. But Westmoreland is the only party that arguably had a claim to the taxes; it has had its day in court; and it has departed the fray. Even if *California* does not preclude the Tribe's claim ab initio, it certainly supports the proposition that there are no compelling equitable considerations to allow a nontaxpayer, like the Tribe, to recover taxes paid by a taxpayer, like Westmoreland, that has abandoned its own claim.

Given the district court's findings, moreover, the Tribe's theory even if correct does not advance its cause. The trial court – which would be principally vested with the responsibility to exercise informed discretion concerning whether the remedy sought will "correct the wrong done" and will "effectuate the purposes" of relevant statutes (*see, e.g., City of Los Angeles v. Manhart*, 435 U.S. 702, 728 (1978) (Marshall, J., concurring in part); *Zenith Radio Corp. v. Hazeltine, Inc.*, 395 U.S. 100, 123 (1969)) – *did* consider both the effect of the state taxes on the Tribe's relationship with Westmoreland (Pet. App. 51-52 (COL ¶¶ 28-30)) and the "[f]ederal policy favor[ing] tribal self-government and economic development" (Pet. App. 45 (COL ¶ 11)) but concluded that the requested relief was not warranted because, inter alia, Westmoreland "would not have paid coal taxes to the Tribe" regardless of whether it had state tax obligations (Pet. App. 35 (FOF ¶ 57); "the Tribe provided little or no governmental services to the Ceded Strip" (Pet. App. 38 (FOF ¶ 65)); petitioners "have always provided public services on the Ceded Strip" (*id.*); petitioners would provide such public services even in the absence of Westmoreland's mining operations (Pet. App. 38 (FOF ¶ 64)); and petitioners "have not received benefits from the Tribe nor has the Tribe given benefits to [petitioners]," (Pet. App. 49 (COL ¶ 24)). While the court of appeals chose to ignore these findings on law-of-the-case grounds (92 F.3d at 829-30 (Pet. App. 9-12)), to the extent deference is

owed in the lower courts' assessment of the "appropriateness" of the relief sought with respect to the factors identified by the Tribe, it is to the district court. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

The "standard" proposed by the United States is equally open-ended. Tellingly, the Government cites only *Porter* in support of the standard's appropriateness. U.S. Br. at 41. That case, however, involved a claim by a federal official seeking an injunction against a landlord's violation of rent control ceilings and recovery of amounts paid in excess of those ceilings on behalf of the overcharged tenants. This Court held the rent-recovery aspect of the relief within the remedial grant of injunctive authority under Section 205(a) of the Emergency Price Control Act of 1942 because it was an appropriate adjunct to the issuance of an injunction restraining violation of the Act. 328 U.S. at 399-401. Thus, *Porter* might provide some support for the United States' theory if the Government were proceeding on behalf of *Westmoreland*, but it is not. Westmoreland instead pursued recovery of its own tax payments and settled that claim with petitioners.

2. Respondents' attempt to minimize the practical and federalism significance of the ad hoc, standardless species of "disgorgement" liability they propose cannot be accepted. Crow Br. at 47-50; U.S. Br. at 44-46.[13] Rather

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[13] The United States remarks that it cannot be "plausibly . . . suggested" that the Government "has taken an unrestrained approach here" or that "it will not exercise [the power to bring suit in federal court] responsibly in the future." U.S. Br. at 46. Petitioners, and their amici curiae (Brief for Nat'l Conf. of State Legislatures et al. at 2, 20-21; Brief of Amici Curiae States of New York et al. at 8), take little comfort in these representations in view of federal trust responsibilities to Indian tribes, but even if the United States were never again to institute a suit comparable to that here and the Eleventh Amendment or 28 U.S.C. § 1341 otherwise forecloses federal court suit, nothing

than acknowledging that the award ordered by the Ninth Circuit raises substantial federalism concerns, respondents simply choose to pretend there is nothing extraordinary in a judgment requiring respondents to turn over $58 million in taxes, and to incur potential liability for prejudgment interest multiple times the principal amount, to a party that did not pay them, even though the party that did pay the taxes unquestionably has no entitlement to them. *See* Crow Br. at 47-50; U.S. Br. at 44-47. This Court nevertheless has emphasized that where a remedy will "intrude into the proper sphere of the States," a court's remedial power should be exercised "only sparingly, subject to clear rules guiding its use." *Missouri v. Jenkins*, 510 U.S. 70, 131 (1995). This is particularly true when the remedy, in practical effect, is a tax refund claim and where, as a matter of both state law and the Due Process Clause, the actual taxpayer had adequate remedies to pursue a refund. *See Arkansas v. Farm Credit Servs. of Cent. Ark.*, 117 S. Ct. 1776, 1779 (1997); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1989).

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precludes a Tribe or other aggrieved nontaxpayer from seeking recovery of taxes paid by a third party in state courts which, in turn, would be bound to honor federal law principles in resolving the claim. *See Felder v. Casey*, 487 U.S. 131, 151 (1988).

CONCLUSION

For the foregoing reasons and those set forth in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MONTANA, MARY BRYSON, BIG HORN COUNTY, and MARTHA FLETCHER,
Petitioners,

v.

CROW TRIBE OF INDIANS and UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES, JOINED BY THE MULTISTATE TAX COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Crow Tribe and the United States have an equitable claim to taxes paid by a third party to Montana and Big Horn County.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials

throughout the United States, have a compelling interest in legal issues that affect state and local governments.[1] *Amicus* Multistate Tax Commission, the official administrative agency of the Multistate Tax Compact, is vitally interested in legal issues affecting the ability of its member States to devise effective and innovative tax policies. All *amici* have an especially compelling interest in legal issues involving federal common law remedies for state taxes which violate federal law.

The issue in this case—whether a federal court can order a State and a local government to "disgorge" to the United States and an Indian Tribe a tax long since collected from a third party—is of fundamental importance to *amici* and their members. Every State has created a remedial scheme which, to protect the governmental interest in sound fiscal planning, is "necessarily designed to operate according to established rules." *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). The Ninth Circuit's holding that Montana and Big Horn County are required to pay over to the Tribe taxes collected from a third party many years ago would not only have dire consequences in this case, it would set a highly disruptive precedent.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in the resolution of the case.

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Amici adopt petitioners' statement.

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that the Crow Tribe and the United States have an equitable claim to the taxes paid by Westmoreland Resources to Montana and Big Horn County. This ruling is a disturbing and dangerous departure from this Court's longstanding recognition of "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment In Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981). The court of appeals' holding is, moreover, totally unsupported by precedent and unnecessary. *Amici* respectfully urge the Court to reverse the judgment below.

1. The equitable claim of the Tribe and the United States—that the State of Montana and Big Horn County be ordered to "disgorge" taxes paid by a third-party taxpayer that has waived its claim for a refund—seeks extraordinary judicial intervention in an area in which the courts have long exercised the utmost restraint. Under settled common law principles, even when the taxpayer itself brings a claim to recover taxes it has paid, the mere fact that "the tax authority collected money to which it was not entitled" is not a sufficient basis for a court to order restitution. 3 George E. Palmer, *The Law of Restitution* § 14.20, at 246 (1978).

The collection of an unconstitutional or illegal tax by a governmental entity thus does not establish that the entity has been unjustly enriched, even at the expense of the taxpayer. In adjudicating taxpayer assumpsit actions, common law courts relied on equi-

table principles which acknowledged the substantial governmental interest in avoiding the disruption of the State's fiscal planning. The case for applying those principles is even stronger here, where a non-taxpayer seeks to compel governmental entities to pay over to it taxes collected from a third-party taxpayer with whom it lacked any fiduciary relationship and the taxpayer had plain and adequate state law remedies.

The "disgorgement" remedy sought by the Crow Tribe and the United States is unnecessary as well as highly disruptive. While the Tax Injunction Act ordinarily prevents federal courts from awarding declaratory or injunctive relief to state taxpayers, Indian Tribes are not subject to this bar. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-75 (1976). The Tribe therefore could have filed suit in federal court to enjoin the State from collecting the tax upon its enactment. The availability of injunctive relief, which the Tribe could have sought immediately upon the taxes' enactment rather than waiting three years, provides additional reason to reverse the judgment of the court of appeals.

2. The court of appeals' order directing "the State and County to disgorge the improperly collected taxes," Pet. App. 12a, to the Crow Tribe and the United States is unprecedented. The court offered no legal authority to support its extraordinary ruling, either in the per curiam opinion that is the subject of Montana's petition for certiorari, or in its three earlier rulings in this case. Moreover, the court of appeals' reliance on its conclusion in *Crow II* "that the taxes had at least some negative impact on the coal's marketability," Pet. App. 100a, is patently insufficient to sustain its judgment awarding respondents the $58.2 million in taxes paid by Westmoreland (with the possible additional award of pre-judgment

interest). Nor do any of the cases cited by the United States and the Tribe support the court of appeals' extraordinary ruling.

3. The Ninth Circuit's "disgorgement" remedy cannot be justified as necessary to deter States from enacting illegal taxes. Montana, like other States, provides taxpayers with a refund remedy and the Tribe could have sought an injunction against the imposition of the taxes at the time they were enacted. Both the taxpayer and the Tribe thus had available adequate procedures for challenging the taxes which would have fully vindicated federal law. Sanctioning a disgorgement remedy, with all of the disruption it entails, will only serve to unduly deter Montana and other States in the exercise of their legislative authority. Moreover, the holding of the court of appeals poses a serious threat to the federal system by providing a foundation for other suits by the United States against States for "disgorgement" of illegal taxes and for analogous suits by States against the Federal Government. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

THE TRIBE AND THE UNITED STATES HAVE NO EQUITABLE CLAIM TO THE TAXES PAID BY A THIRD PARTY TO MONTANA AND BIG HORN COUNTY

The Ninth Circuit's assertion of federal judicial power to create an equitable claim in favor of the Tribe and the United States to recover taxes long since paid by a third party to Montana and Big Horn County constitutes a highly disruptive departure from this Court's longstanding recognition of "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding

cases that affect such systems." *Fair Assessment In Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981). Moreover, the court of appeals' holding that "the Tribe state[s] a claim for equitable relief despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust," Pet. App. 8a, and that "the State and County . . . disgorge the improperly collected taxes" to the Tribe, *id.* at 12a, is unprecedented. Not only does the Ninth Circuit's judgment have grave financial consequences for the State and County in this case, it is not necessary to vindicate federal law and establishes a precedent which could gravely harm the federal system.

As *amici* explain below, neither the traditional principles specific to the law of restitution nor general principles of equity jurisprudence support the Tribe's assertion that it is entitled to the taxes paid by Westmoreland. Under settled principles of the common law, even when a taxpayer itself brings a claim, the mere fact that "the tax authority collected money to which it was not entitled" is not a sufficient basis for a court to order restitution. 3 George E. Palmer, *The Law of Restitution* § 14.20, at 246 (1978). There is, of course, far less basis for a court to order such "restitution" when a non-taxpayer brings a claim. Even when the federal courts act in an area in which the Constitution grants them common law rulemaking powers, they do not have unlimited authority to fashion "remedies" for illegal state taxes. *See, e.g., United States v. California*, 507 U.S. 746, 751-56 (1993).[2] The judgment of the court of appeals should therefore be reversed.

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[2] *Amici* agree with petitioners that *United States v. California* requires reversal of the judgment below.

A. Under Traditional Principles Of Restitution, Montana And Big Horn County Have Not Been Unjustly Enriched

While the United States' and the Tribes' complaints alternatively cast their claims as "assumpsit for money had and received," Pet. App. 249a, or for the imposition of a "constructive trust," *id.* at 250a, at bottom their claims seek to require Montana and Big Horn County to pay over to them taxes collected not from the Tribe, but from a third party, Westmoreland Resources. Regardless of whether it is characterized as "assumpsit" or "imposition of [a] constructive trust," the Ninth Circuit's order that the State and County must "disgorge" the taxes to the Tribe sets a dangerous precedent that should be reversed.

The general principle that guides the remedies of assumpsit and constructive trusts—"that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money," *Moses v. MacFerlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B. 1760)—has long been applied with particular restraint in cases involving illegal taxation. As a leading authority explains, "[t]he common law does not provide for restitution of tax payments simply because the tax authority collected money to which it was not entitled." 3 *Palmer on Restitution* § 14.20, at 246.

In recognition that the restitution of back taxes has great potential to disrupt the fiscal affairs of government, the common law interposes various preconditions on the granting of relief. The common law thus denies a taxpayer the right to recover illegal taxes paid under a mistake of law. *See id.* § 14.20(a), at 248; *Restatement of the Law of Restitution, Quasi*

Contracts and Constructive Trusts § 75, at 319 (1937) (comment a). Moreover, "[t]he generally stated common law rule is that there may be no recovery of taxes paid pursuant to legislation which is unconstitutional or otherwise invalid unless the tax was paid under duress." 3 *Palmer on Restitution* § 14.20(a), at 248; *Restatement of Restitution* § 75, at 322-23. *See also City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) 720, 732 (1866); *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137, 153 (1836); *Bend v. Hoyt*, 38 U.S. (13 Pet.) 263, 267 (1839).[3] Even where protest has been made to a tax paid under duress, a taxpayer can waive that objection, thereby forfeiting the right to recover. *Elliot*, 35 U.S. (10 Pet.) at 157 (discussing *Greenway v. Hurd*, 4 Term 553, 100 Eng. Rep. 1171 (K.B. 1792)). Such claims are also barred by other equitable principles such as laches.

As these authorities demonstrate, the fact that a governmental entity imposes and collects an unconstitutional or illegal tax does not establish that the entity has been unjustly enriched—even at the expense *of the taxpayer*. Rather, in adjudicating taxpayer assumpsit actions, common law courts relied on equitable principles which acknowledged the government's substantial interest in avoiding disruption of its fiscal planning. The case for applying these principles is

[3] As the Court stated in *City of Philadelphia v. Collector*:

> Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received.

72 U.S. (5 Wall.) at 731-32.

even stronger here, where a non-taxpayer seeks to compel governmental entities to pay over to it taxes collected from a third party, notwithstanding that it was not in a fiduciary relationship with the taxpayer, who, under state law, had plain and adequate remedies to obtain a refund of the tax.

Recognizing as much, the United States now asserts that "[p]etitioners . . . incorrectly understand this case as one involving an independent cause of action for restitution, sounding in federal common law." U.S. Br. in Opp. 17. The Tribe's Fourth Amended Complaint, however, is denominated as a "Complaint for Restitution," Pet. App. 252a; both it and the United States' amended complaint assert as their causes of action assumpsit and creation of a constructive trust which are, of course, claims for restitution. *See id.* at 257a-259a; *see also id.* at 249a-250a (U.S. First Amended Complaint). That the United States now asserts that "[t]he relief granted to the Tribe is properly understood as an exercise of the broad equitable authority of the federal courts to remedy violations of federal law," U.S. Br. in Opp. 16, is not surprising as neither it nor the Tribe can cite a single case in which a court created a cause of action against a taxing authority for monetary relief in favor of a non-taxpayer third party. This is for good reason, as it would result in a dramatic expansion of government liability and seriously disrupt fiscal planning.[4]

[4] The United States asserts that it is incorrect that "the ruling of the court of appeals means that any person suffering injury as a result of an unlawful state tax imposed on a third party would have a cause of action under federal com-

Contrary to the assertion of the United States, the "equitable authority of the federal courts to remedy violations of federal law" is not so "broad" that it permits a federal court to create a remedy against the States out of whole cloth. *Cf. Lewis v. Casey*, 116 S.Ct. 2174, 2183-84 (1996); *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995). Indeed, in a long line of cases implicating state tax authority, this Court has held that the federal courts generally may not grant either the traditional equitable remedy of an injunction or the more modern remedy of a declaratory judgment. *See, e.g., Matthews v. Rodgers*, 284 U.S. 521, 525-26 (1932); *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).

To be sure, the common reason for denying a taxpayer injunctive relief is that paying a tax does not cause irreparable harm and that a refund provides an adequate remedy at law. *See, e.g., Dows*, 78 U.S. (11 Wall.) at 110. In this case, of course, the Tribe was not the taxpayer and thus could not pursue a claim for a refund absent Westmoreland's assigning its claim to the Tribe (which it did not do). Moreover, the absence of any precedent supporting the

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mon law for recovery of the taxes paid by the third party." Br. U.S. in Opp. at 17-18 n.9.

Whether the Ninth Circuit's holding would lead other courts to sanction a new category of claims against tax authorities by non-governmental entities is, of course, unknown. It is, however, a very small step from the Ninth Circuit's holding to such a result and it is reasonable to believe that lawyers would attempt to bring such claims.

What cannot be denied is that the holding below, by sanctioning suits for "disgorgement" by the United States against States and local governments, sets a dangerous precedent for the federal system. *See* pp. 18-21, *infra*.

notion that a non-taxpaying third party can sue a governmental entity for monetary relief should have made it obvious to the Tribe from the start that there was no adequate remedy at law and that its only remedy was to seek to enjoin the State from collecting the tax. Indeed, if Westmoreland had successfully pursued a refund claim under the procedures provided by Montana law, *see* Pet. 3 n.1, the State and County would have no "profits" to "return . . . to the Tribe." U.S. Br. in Opp. 14. Under such circumstances, the Tribe unquestionably could not pursue its assumpsit and constructive trust theories; only an injunction would have protected the Tribe's interest.[5]

The Tax Injunction Act, 28 U.S.C. § 1341, would not have precluded the Tribe from filing suit in federal district court to enjoin the State from collecting the tax upon its enactment. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-75 (1976); *cf. Department of Employment v. United*

---

[5] That Westmoreland did not successfully pursue a refund claim cannot be the basis for allowing the Tribe's claims to go forward. The States must be able to rely on their statutes of limitations and the other preconditions to refunds (such as protest and exhaustion requirements) which have been imposed to protect their interest in fiscal planning. *See United States v. California*, 507 U.S. at 759. As the Court stated in *McKesson Corp. v. Florida*, 496 U.S. 18, 45 (1990):

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint . . . [and] enforce relatively short statutes of limitations applicable to such actions . . . .

It must also be noted that Westmoreland did not act as a fiduciary of the Tribe.

States, 385 U.S. 355, 358 (1966) (Tax Injunction Act inapplicable to suit by federal instrumentality to enjoin state tax). This much was made clear in *Moe*, which affirmed the decision of a three-judge district court rendered prior to the enactment of the coal tax, that upheld federal jurisdiction over a different tribe's suit to enjoin Montana from imposing its cigarette sales tax on reservation smoke shops. *See* 425 U.S. at 466, 470-75 (affirming 392 F. Supp. 1297, 1301-04). The Tribe thus cannot claim that its three year delay in pursuing an injunction was caused by uncertainty as to the remedy's availability.

Moreover, the Tribe's ability to protect its interest by seeking an injunction provides further reason to dismiss this action. It is, of course, well established that "[t]he rule allowing a person to recover money paid on the ground that the payment was under compulsion applies only where there is no other means of immediate relief, and therefore no avenue of escape from the threatened injury other than by making the payment." 66 Am. Jur. 2d *Restitution And Implied Contracts* § 114 (1973) (citations omitted); *see also* 72 Am. Jur. 2d *State and Local Taxation* § 1094 (1974) ("The rule has also been applied where the taxpayer might have obtained adequate relief by injunction or mandamus.") (citations omitted). If a taxpayer, who suffers out-of-pocket loss when it pays an illegal tax, is not entitled to restitution if it could have avoided the payment by obtaining an injunction, the Tribe, a non-taxpayer, should be barred from seeking "disgorgement."

B. There Is No Precedent For The Ninth Circuit's Disgorgement Order

The Ninth Circuit's order directing the district court to enter "an order directing the State and County to disgorge the improperly collected taxes" to the Tribe, Pet. App. 12a, is unprecedented. In *Crow IV*, the Ninth Circuit did not cite a single case which supports its holding that "the Tribe stated a claim for equitable relief despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust." Pet. App. 8a. Instead, the court stated that it was merely reiterating its previous holding from *Crow III*. *See id.* In its *Crow III* decision, however, the Ninth Circuit likewise did not cite a single case which supports its novel remedy. *See* Pet. App. 59a-60a. There, too, the court asserted that the propriety of its remedy "was already addressed" in *Crow II*. Pet. App. 59a.

The court's decision in *Crow II*, however, did nothing of the sort, holding only that the tax was preempted by federal law and interfered with tribal sovereignty. *See* Pet. App. 90a-109a. The court's conclusion "that the taxes had at least some negative impact on the coal's marketability," *id.* at 100a, does not establish the Tribe's entitlement to the unprecedented remedy of requiring the State to pay over to it $58.2 million in taxes collected from a third party, which had no obligation to pay taxes to the Tribe. Many illegal taxes impose economic loss on third parties engaged in a commercial relationship with a taxpayer. The common law, however, has never recognized a cause of action by non-taxpayer third parties against the taxing authority for "restitution" of the economic loss caused by illegal taxes. *See* 84 C.J.S. *Taxation* § 631(b) (1954) ("A person is en-

titled only to a refund of taxes paid by him, and not to taxes paid by others.") (citations omitted); *see also id.* at n.5 ("The fact that the taxpayer waived his right to a refund does not entitle one who has not paid the taxes to it.").

The cases cited by the United States and the Tribe are reeds which are too thin to support the Ninth Circuit's holding. Citing *Ward v. Board of County Commissioners*, 253 U.S. 17 (1920), the United States asserts that "[t]here is nothing novel about the court of appeals' exercise of equitable authority to require petitioners to surrender the proceeds of their illegal taxes." Br. U.S. in Opp. 19. In *Ward*, however, the Indians were the taxpayers. *See* 253 U.S. at 18. They were thus entitled to recover the payment of illegal taxes that had been "made under compulsion." *Id.* at 24. The case thus stands for the entirely unremarkable proposition of the common law that if a taxpayer is compelled to pay an illegal tax, " 'he may recover it back . . . in an action of assumpsit for money had and received.' " *United States v. California*, 507 U.S. at 751 (quoting *Philadelphia v. Collector*, 72 U.S. (5 Wall.) at 732).

The United States also cites *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), for the "beyond debat[able]" proposition that "[t]he relief granted to the Tribe is properly understood as an exercise of the broad equitable authority of the federal courts to remedy violations of federal law." Br. U.S. in Opp. 16. *Porter*, however, does not support the intrusive relief awarded here.

The issue in *Porter* was whether a federal court had power to order a landlord to provide restitution of rents in excess of the legal maximum in a suit

brought by the Federal Government under § 205(a) of the Emergency Price Control Act of 1942, which authorized an "injunction, restraining order, or other order." 328 U.S. at 396-97. This Court held that "[a]n order for the recovery and restitution of illegal rents may be considered a proper 'other order' " under § 205(a) either because "[i]t may be considered as an equitable adjunct to an injunction decree" or as "an order appropriate and necessary to enforce compliance with the Act." *Id.* at 399-400.

Of note, the decree the Federal Government sought was to require the landlord "to tender to such persons as are entitled thereto a refund of all amounts collected by [the landlord] from tenants as rent . . . in excess of the maximum rents." *Id.* at 396-97. As the Court observed, the Federal Government in seeking such a decree merely "asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity." *Id.* at 402.

The Ninth Circuit's order that "the State and County . . . disgorge the improperly collected taxes," Pet. App. 12a, stands in stark contrast to the equitable relief which the Federal Government sought in *Porter*. Unlike the relief at issue in *Porter*, which, if granted, would restore the status quo, the Ninth Circuit's "disgorgement" remedy exceeds a federal court's equitable powers. It does not restore the status quo because the taxes were not paid by the Tribe but rather by Westmoreland (and its utility customers) and thus do not rightfully belong to the Tribe.

Moreover, even if the tax caused economic harm by diminishing coal sales and the Tribe's royalties, there

has been no proof as to the amount of lost royalties that is attributable to the tax. It might well be that the tax had only an insubstantial impact on the Tribe's royalties; in that event the Ninth Circuit's disgorgement order would not restore the status quo but rather would provide a windfall to the Tribe. Thus, even if an order of this sort (*i.e.*, a directive to a governmental entity to pay over taxes illegally collected to a non-taxpayer) is an appropriate exercise of federal equity jurisdiction, the Ninth Circuit's "disgorgement" order is contrary to the most fundamental principles of equity jurisprudence. And the order also violates this Court's instruction to the lower federal courts that in intergovernmental litigation, "[n]othing seems to us more appropriate than [showing] due regard for local institutions and local interests." *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 351 (1939) (action by U.S. to recover illegal taxes paid by Indian). *Porter* thus provides no support for this extraordinary order.

Equally unpersuasive is the Tribe's assertion that this "case is on all fours with" *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam). Br. Crow Tribe in Opp. 24. In *Snepp*, the Court upheld the imposition of a constructive trust on an ex-CIA agent's book profits because of the agent's violation of "his fiduciary obligations to the Agency" caused by his failure to submit the book for pre-publication review. 444 U.S. at 508. Snepp had signed an employment agreement under which he promised that he would not publish information regarding the CIA, both during and after his employment, without the Agency's prior approval. *Id.* at 507-08.

Even so, the Court did not lightly impose the "unprecedented and drastic relief" of a constructive

trust. 444 U.S. at 517 (Stevens, J., dissenting, joined by Brennan & Marshall, JJ.). Rather, it did so only after concluding that "Snepp explicitly recognized that he was entering a trust relationship" which "specifically imposed the obligation not to publish *any* information relating to the Agency without submitting the information for clearance." 444 U.S. at 510-11 (footnote omitted). The equitable remedy of a constructive trust was clearly necessary because "the actual damages attributable to a publication such as Snepp's generally are unquantifiable." *Id.* at 514. Moreover, the alternative of a tort suit for punitive damages would " 'require[] the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution.' " *Id.* at 515 (citation omitted). Noting that the remedy of a constructive trust was "the natural and customary consequence of a breach of trust," *id.*, that "[i]t deal[t] fairly with both parties by conforming relief to the dimensions of the wrong," *id.*, and that it was "tailored to deter those who would place sensitive information at risk," *id.*, the Court held that it was properly imposed on Snepp's book profits. *Id.* at 516.

The unique circumstances which led the Court to hold that the unprecedented and drastic remedy of a constructive trust could be imposed in *Snepp* are simply not present here. Montana does not have a trust relationship with the Tribe. Moreover, the Ninth Circuit's disgorgement order does not "conform[] relief to the dimensions of the wrong," 444 U.S. at 515, because there is no proof that the amount of tax the State collected from Westmoreland corresponds with the Tribe's lost royalties.

C. The Ninth Circuit's Remedy Is Not Necessary To Vindicate Federal Law And Could Gravely Harm The Federal System

Nor can the Ninth Circuit's remedy be justified as necessary to deter Montana and other States from imposing similar taxes. Here, for example, the State provided the taxpayer with a refund remedy for all tax years in question. Moreover, the Tribe could have sought an injunction in federal court upon the taxes' enactment. *See supra* at 11-12. Both the taxpayer and the Tribe thus had available ample procedures for challenging the tax; such procedures are more than adequate to deter the States from enacting unconstitutional taxes.

Indeed, sanctioning the Ninth Circuit's disgorgement remedy will only serve to unduly deter Montana and other States in the exercise of their legislative authority. As this case illustrates, the constitutionality of a proposed tax is not always readily determinable as a matter of black letter law.[6] Creating a disgorgement remedy against the States for taxes which are ultimately held to violate principles of federal Indian law is particularly troublesome given the at times complex and indefinite nature of the applicable jurisprudence. As the Court, in language fully applicable to this case, observed in *Cotton Petroleum*:

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[6] Indeed, Montana's coal severance tax was upheld against a challenge brought under the Commerce and Supremacy Clauses. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). And in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Court upheld New Mexico's severance tax on oil and gas, which differed from the Montana tax only as to degree, against a challenge under the Indian Commerce Clause.

> [Q]uestions of pre-emption in this area are not resolved by reference to standards of pre-emption that have developed in other areas of the law, and are not controlled by mechanical or absolute conceptions of state or tribal sovereignty. Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case requires a particularized examination of the relevant state, federal, and tribal interests.

490 U.S. at 176 (internal quotations and citations omitted).

It will thus frequently be unclear to state officials whether a proposed tax will ultimately be upheld by the courts under federal Indian law. If a federal court can order a State to disgorge a tax (potentially with interest) many years after it has been collected and the actual taxpayer's claims have been resolved, state officials will be compelled to be overly cautious and forgo the enactment of taxes which ultimately would have been upheld.

Finally, the United States' assertions that "the ruling of the court of appeals reflects the application of well established general principles to the unique circumstances of the present case," Br. U.S. in Opp. 19, and that there is "no persuasive reason to believe that the ruling . . . is likely to have sweeping implications," *id.* at 21, are not credible. To the contrary, the holding below provides a foundation for other suits by the United States against States and local governments. For example, under the theory that the burden of an illegal state tax caused a taxpayer to default on its federal tax obligation, the United States could sue a State seeking "disgorgement." The United States could assert that it brought the suit

in its sovereign capacity and is thus not foreclosed by *United States v. California* and various state rules imposing statutes of limitation, requiring exhaustion of administrative remedies, and limiting refunds to actual taxpayers. *See* U.S. Br. in Opp. 15 (distinguishing *California* on ground that "the United States was not acting in its sovereign capacity when it agreed to reimburse the contractor for state taxes").

Such suits would, of course, pose a grave threat to the integrity of the States' tax systems and their fiscal planning.[7] The States' interest in relying on the conclusive effects of the decisions of actual taxpayers is equally compelling whether the United States brings a suit in its sovereign or proprietary capacity. *Cf. California*, 507 U.S. at 751-56 (rejecting Federal Government's assertion of a cause of action under federal common law to recover illegal state taxes paid by a contractor). Sanctioning the right of the United States to sue the States and their subdivisions to "disgorge" taxes collected from third parties could thus fundamentally undermine the federal system. *Cf. Metcalf & Eddy v. Mitchell*, 269

[7] Nor is it farfetched to think that if the United States' theories are credited, the States would attempt to bring similar claims against the Federal Government. For example, an illegal federal tax assessment might cause a taxpayer to default on its state tax obligation. Alternatively, in enforcing an illegal tax assessment, the IRS might seize a taxpayer's property. A State having a lien would thus be deprived of property in violation of the Fifth Amendment. *See Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983). It seems unlikely that the United States would concede that a federal court's creation of a cause of action on behalf of the State to recover the tax or property merely "invoke[d] the remedial authority of the federal courts to remedy a violation of federal rights." U.S. Br. in Opp. 17.

U.S. 514, 523 (1926) (neither sovereign "may destroy the other nor curtail in any substantial manner the exercise of its powers"). The Court should therefore reverse the Ninth Circuit's extraordinary and unprecedented judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 96-1829

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IN THE

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

against

CROW TRIBE OF INDIANS; and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, FLORIDA, HAWAII, IDAHO, IOWA, MICHIGAN, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON AND WYOMING IN SUPPORT OF PETITIONERS

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Interest of *Amici Curiae*

The States of New York, Alabama, Alaska, Arizona, California, Florida, Hawaii, Idaho, Iowa, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Dakota, South Dakota, Utah, Vermont, Virginia, Washington and Wyoming file this brief as amici curiae in support of petitioners and urge the reversal of the Judgment and Order of the Ninth Circuit Court of Appeals in *Crow Tribe of Indians, et al. v. State of Montana, et al.*, 92 F.3d 826 (1996) (the "Judgment"). The ability to tax is a function critical to States' sovereignty and the States have a vital interest in their ability to have consistent, effective and assured tax collection and protest programs. The Ninth Circuit's ruling invades that interest. It permits the avoidance of state administrative and judicial remedies, thereby infringing upon the States' taxation processes. It allows a non-taxpayer to challenge another's tax liability, thereby exponentially expanding the number and scope of available tax challenges. It allows the litigation of settled issues, thereby encouraging multiplicitous litigation and rendering state settlements and judgments subject to collateral attack. It creates an amorphous, standardless, retrospective equitable theory of recovery, thereby rendering the outcome of litigation unpredictable, and creating the potential for devastating impacts on the States' fiscal planning processes.

The holding of the Ninth Circuit therefore puts state tax assessment collection systems at risk, and potentially creates vast retroactive exposure to tax reimbursements to an extent which threatens fiscal planning processes. In short, the Judgment is a direct affront to state sovereignty and fiscal integrity.

Summary of the Argument

The power to tax is at the core of state sovereignty. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989); *McKesson Corp. v. Florida Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). Inherent in the power to tax must be the power to mandate procedures, consistent with constitutional restraints, both for imposing and for protesting such taxes.

In *United States v. California*, 507 U.S. 746 (1993) ("*California*"), a case whose facts are closely aligned with those here, this Court rejected a claim asserted by the federal government in assumpsit for money had and received regarding state taxes imposed upon a federal contractor. This Court ruled that privity was lacking between the federal government and the State of California and that no implied contract between them was created. Consequently, an assumpsit action for money had and received will not lie. This Court explicitly noted that the theory of recovery was unavailable even though the federal government would experience a financial impact resulting from its obligation to reimburse taxes to the contractor.

As discussed more fully *infra*, the facts of *California* parallel those presented in the case at bar. In light of these similarities, we submit, the result should have been the same and the Ninth Circuit's Judgment should be reversed.

The Ninth Circuit's ruling also is contrary to established principles of federal equity practice, comity and the doctrine of federal court abstention. Numerous cases explicitly recognize that federal courts must exercise restraint from interfering with

state taxation programs where a State provides an adequate protest procedure to contest its tax liabilities. *Matthews v. Rodgers*; 284 U.S. 521, 526 (1932) (prohibiting invoking a federal court's equity powers in the context of state tax disputes); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913) (prohibiting use of general equity powers in the context of state tax disputes); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (deferring to state tax procedures on principles of comity); *National Private Truck Council, Inc., et al. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) (federal equity principles bar declaratory and injunctive relief under 42 U.S.C. § 1983 in state court actions challenging a state tax under the Commerce Clause where an adequate legal remedy exists).

Thus, the Judgment should be reversed because it is contrary to *California* and violates principles of federal equity practice, comity and judicial restraint.

ARGUMENT

Point I

The Judgment awards relief where elements of an assumpsit action for money had and received are missing and, hence, is contrary to *California*.

California presented a set of facts substantially similar to those involved here. There, the State of California had issued sales and use tax deficiency notices to a federal contractor. The contractor, using funds advanced by the federal government, paid the taxes under protest and commenced a refund action in

state court. Ultimately, California and the contractor settled the case, and the state court action was dismissed. *United States v. California*, 507 U.S. at 749.

Subsequently, the federal government, despite the existence of state protest procedures, sued California in federal court for a declaratory judgment and a refund on the theory that as a federal contractor, the contractor was exempt from state taxation. The federal government contended that its indemnification obligations pursuant to contract made it the real party in interest entitled to maintain an assumpsit action for money had and received in federal court, notwithstanding that the tax actually had been imposed on the contractor and notwithstanding that the contractor had settled its tax dispute with the State. This Court rejected those claims.

This case presents a substantially similar set of facts and claims. In both cases, a state tax was imposed not upon an entity immune from taxation but on another: in *California*, on the contractor; in this case, on the mineral lessee. In both cases, the actual taxpayer paid the tax in accordance with state law. In both cases, the actual taxpayer was unable to pursue additional remedies in state court: in *California* because of a settlement with state taxing authorities after protest (507 U.S. 746) and in this case, because of the mineral lessee's failure to meet state mandated protest procedures (92 F.3d 826). In both cases, an immune non-taxpayer claimed a negative economic effect: in *California*, on the federal government directly through its contractual obligation to reimburse the contractor for state imposed taxes; in this case, on the Crow Tribe indirectly through the claimed possibility that it might have been able to extract higher royalty payments from the mineral lessee were it not for the tax. In both cases, the immune non-taxpayer commenced an assumpsit action for money had and received in

United States District Court challenging the imposition of state taxes on the state taxpayer on the theory that their relationships with the taxpayer created an identity of interest. Thus, the facts and claims involved in the two cases are extremely similar.

In *California*, this Court reaffirmed that an assumpsit action for money had and received may be pursued only in the absence of state remedies for the recovery of taxes erroneously or illegally extracted. *United States v. California*, 507 U.S. at 751, citing *City of Philadelphia v. The Collector*, 5 Wall. 720 (1867). Equally importantly, this Court implicitly ruled that the traditional elements of an assumpsit action for money had and received must be present for a petitioner to be entitled to relief.

A unanimous Court in *California* found on the facts presented that the elements of an assumpsit action for money had and received were lacking and rejected the federal government's claim. Specifically, this Court found that the relationships between the federal government, its contractor and the State were insufficient to imply in law a contractual relationship between the federal government and the State. Such a relationship, this Court held, is an indispensable element of an assumpsit action for money had and received. *United States v. California*, 507 U.S. at 750-751.

Going further, this Court explicitly held that an adverse economic consequence upon the immune entity standing alone does not infringe upon state sovereignty. *Id.*, at 759-760 ("Today we hold that shouldering the 'entire economic burden of the levy,' *Id.*, at 734 [*United States v. New Mexico*, 455 U.S. 720 (1982)], through indemnification does not give the federal Government a federal common-law cause of action for money had and received to challenge a state tax on State-law grounds simply because it is the Government.")

Applying the *California* principles to the facts presented here, the Ninth Circuit should have rejected the Crow Tribe's claim. The court awarded relief notwithstanding an explicit acknowledgment that elements of an assumpsit action for money had and received were missing ("However, we held in *Crow III* that the Tribe stated a claim for equitable relief despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust...." 92 F.3d at 828). In doing so, the Ninth Circuit's ruling contradicts this Court's holding in *California,* which does require that the elements of an assumpsit action for money had and received be met to warrant awarding relief under that theory. Thus, whereas in *California* this Court denied relief specifically because the traditional elements of an assumpsit action for money had and received were missing, the Ninth Circuit granted relief notwithstanding that those same elements were missing.

The conclusion therefore is inescapable that the Ninth Circuit here either ignored *California* or else crafted a new, heretofore unknown equitable cause of action not requiring those elements. To the extent that the Judgment is contrary to *California*, it should be reversed for that reason alone. To the extent that it purports to create some new equitable cause of action, it should be reversed for the reasons which follow.

Point II

Federal equity practice prohibits federal court interference in state taxation systems.

This Court has long recognized the principle, alternately described as a principle of federal equity practice, a principle of comity, or a doctrine of federal court abstention, that where a

State provides adequate procedures for relief from inappropriate tax assessments, the federal courts will refrain from interfering with those procedures. *Fair Assessment in Real Estate Ass'n v. McNary, supra*; *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976); *Great Lakes Co. v. Huffman*, 319 U.S. 293, 298 (1943). If the decision below is construed to create a new equitable theory of recovery outside of the context of an assumpsit action for money had and received, then the Ninth Circuit has acted contrary to these principles of restraint.

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976), is especially relevant to this case because it addresses not only the statutory prohibition of the Tax Injunction Act but principles of federal equity practice as well. Quoting from *Great Lakes Co. v. Huffman, supra*, at 298, which itself quoted from *Matthews v. Rodgers*, 284 U.S. 521, 525-526 (1932), this Court observed: "the mere illegality or unconstitutionality of a state . . . tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved." 425 U.S. at 470.

Similarly, *Great Lakes Co. v. Huffman, supra,* recognizes that federal courts should refrain from exercising their equity powers to displace adequate state taxation protest procedures. This Court, quoting from *Matthews v. Rodgers, supra*, at 525, stated in part: "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Great Lakes Co. v. Huffman*, 319 U.S. at 298.

To the extent that the Ninth Circuit decision might be read to create a new federal right available to non-taxpayers to challenge another's tax liability, it is inconsistent with this Court's ruling in *National Private Truck Council, Inc., et al. v. Oklahoma Tax Comm'n*, *supra*. In that case, this Court recognized "the strong background presumption against interference with state taxation," which is voiced in a statute such as the Tax Injunction Act (28 U.S.C. § 1341), as a "principle of federalism." 515 U.S. at 590. Thus, this Court held that 42 U.S.C. § 1983 does not call for federal or state courts to award injunctive or declaratory relief when an adequate legal remedy exists under state law. *Id.*, at 590-91. As this Court noted in *National Private Truck Council, Inc.*, "[w]hether a suit is brought in federal or state court, Congress simply did not authorize the disruption of state tax administration in this way." *Id.*, at 590. A federal common law right would be subject to this same basic principle of federalism.

Thus, if indeed the Ninth Circuit has created a new theory of recovery, it has done so by invading principles of restraint which federal courts have followed until now. For that reason, the Judgment should be reversed.

CONCLUSION

The Judgment should be reversed.

Respectfully Submitted,

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